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Practical Reason: The Commercial Speech Paradigm

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PRACTICAL REASON: THE COMMERCIAL SPEECH PARADIGM

*Edward J. Eberle**

First Amendment jurisprudence incorporates a continual struggle to balance conflicting interests. Free speech values must be weighed against communitarian interests in a rational manner. The article examines the foundationalist approach to this task, and finds it incapable of providing a unified First Amendment theory. Through examination of the treatment of commercial speech, the article arrives at a more coherent approach through the application of practical reasoning. The proposed methodology allows for principled analysis and decisions which yield an internally consistent body of law.

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O sages standing in God's holy fire
 As in the gold mosaic of a wall,
 Come from the holy fire, perne in a gyre,
 And be the singing masters of my soul.
 Consume my heart away; sick with desire
 And fastened to a dying animal
 It knows not what it is; and gather me
 Into the artifice of eternity.
 Once out of nature I shall never take
 My bodily form from any natural thing,
 But such a form as Grecian goldsmiths make
 Of hammered gold and gold enamelling
 To keep a drowsy emperor awake;
 Or set upon a gold bough to sing
 To lords and ladies of Byzantium
 Of what is past, or passing, or to come.¹

INTRODUCTION

A debate rages in current First Amendment theory² between those who view the Amendment as containing one or a selective core of foundational values ("Grand Theory")³ and those who espouse legal pragmatism.⁴ In the realm of Grand Theory, a remarkable outpouring of scholarship has attempted to explain the central meaning of the First Amendment in terms of fundamental values.⁵

1. WILLIAM B. YEATS, *Sailing To Byzantium* (1927), in *THE TOWER* 1, 2-3 (1928).

2. My concern in this article is with the speech clause, rather than the press or religion clauses of the First Amendment.

3. "Foundationalism [is] the effort to discover a unified principle that would provide the basis for judicial decisions." Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1334 (1988). Foundationalism is thus the doctrine based upon the theoretical system described in this article as "Grand Theory."

4. "Legal pragmatism . . . essentially means solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy . . ." *Id.* at 1332. For a further description of legal pragmatism, see *infra* notes 40-59 and accompanying text.

5. Since the seminal case of *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 283 (1964), the search for the central meaning of the First Amendment has been nothing short of epic. Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1632 n.81 (1987). See, e.g., Harry Kalven, Jr., *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 194-200 (analyzing the initial impact of *New York Times* on First Amendment theory).

Among the scholars examining this topic are Professor Redish, who sees the Amendment in terms of the core value of self-realization,⁶ Professor Baker, who believes the main value of the Amendment lies in encouraging individual liberty,⁷ and Professor Meiklejohn, Judge Bork, and others who view the Amendment as a bulwark of self-government.⁸

Pragmatism, by contrast, asserts that attempts to explain the Amendment solely in terms of fundamental values have failed to explain all dimensions of reality that reflect through the First Amendment prism. Instead, modern pragmatism views the Amendment in terms of a web of interlocking values that serve to support one another. Pragmatism further advocates solutions to First Amendment problems through careful, contextual, pragmatic reasoning. Pragmatism is thus a search for a Middle Ground in First Amendment theory between the grandeur of Grand Theory and reliance on ad hoc balancing.

This article continues the search for the Middle Ground in First Amendment theory.⁹ Grand Theory is stimulating and useful in illuminating the First Amendment and its core values. Yet while heuristic, Grand Theory appears to have been thwarted in its efforts to explain free speech only in terms of foundational values by the complexity of social reality. Grand Theory, therefore, fails to achieve its goal of a unified First Amendment theory. Accordingly, there is a need to move beyond Grand Theory toward a vision of the First Amendment that is more encompassing and more satisfying, referred to here as the Middle Ground. To this end, this article provides further content to this more comprehensive theory.

The argument in favor of the Middle Ground proceeds as follows. Part I outlines the ongoing debate in First Amendment jurisprudence, describing the context in which the Middle Ground

6. See generally MARTIN REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 9-40 (1984); *infra* notes 24-25 and accompanying text.

7. See generally C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); *infra* notes 26-28 and accompanying text.

8. Meiklejohn and other advocates of a political speech model of the First Amendment are discussed *infra* text accompanying notes 16-17, 20-22. See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (2d ed. 1965) (original title: *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)); Robert H. Bork, *Neutral Principles and Some First Amendment Jurisprudence*, 47 IND. L.J. 1, 20-35 (1971) (arguing that the fundamental aspect of First Amendment protection addresses political discourse).

9. The search for the Middle Ground is by no means novel, as the text accompanying *infra* notes 60-78 discusses with respect to the work of Professors Farber, Frickey, Schauer and Shiffrin, among others.

vision has evolved. Here, the article describes the contributions and shortcomings of Grand Theory in understanding the Amendment. For example, the reality of our world is so complex that descriptions of the Amendment only in terms of foundational values have proved limiting. Furthermore, traditional First Amendment analysis eschews foundationalism in favor of pragmatism. To this extent, Grand Theory is at odds with judicial reasoning and runs the risk of creating a deeper rift between theory and practice. Therefore, the focus of First Amendment work should shift toward the Middle Ground, combining the insights of Grand Theory with the flexibility of practical reasoning.

Part II describes the Middle Ground, which captures the decisional process of the courts and, yet, offers a measure of grandeur too. It also brings a certain structure, coherence and dynamism to the First Amendment. The Middle Ground views the Amendment as embodying many diverse but interrelated values. These values support one another, but also pose their own inner tensions. Consequently, the types of speech supported by these values may differ in importance. For example, political speech is more important than commercial speech in the hierarchy of values plainly embodied within the Amendment and increasingly recognized by the Supreme Court.¹⁰ Nevertheless, First Amendment values can come into conflict with other communal interests. Accordingly, one key question in First Amendment theory is how to accommodate free speech and communitarian values. This has been a main preoccupation of the Supreme Court, whose efforts bespeak the difficulty of the task. Traditional legal reasoning may not, in fact, be fully up to this task, as Part IV indicates. This article argues that such accommodation can best be reached through practical reasoning; that is, by identifying and comparing the values at issue and the contexts in which they arise, and then determining which value or values should prevail. Drawing upon moral philosophy, the article describes how practical reason may better achieve reasonably reliable results.

In addition, Part III provides further content to the Middle Ground vision by focusing on one difficult area of First Amend-

10. The Supreme Court first recognized a hierarchy of values within the First Amendment in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (commercial speech afforded a limited measure of protection "commensurate with its subordinate position in the scale of First Amendment values"). Since *Ohralik*, the Court has acknowledged that hierarchy explicitly. See, e.g., *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989).

ment law — commercial speech. Initially, Part III provides grounding in the relationship of commercial speech to First Amendment theory. This analysis illuminates some of the inner dynamics in First Amendment theory that the Middle Ground vision captures, and it lays the foundation for the practical reasoning model to be applied to speech questions. The fit of commercial speech within free speech theory is examined in subsection A, through analysis of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹¹ Drawing upon the *Virginia Pharmacy* paradigm, this section first evaluates the free speech values implicated by commercial speech. The Court's reasoning in that case illustrates that it relied upon a web of interlocking values to fashion broad support for commercial speech. Next, in assessing the asserted state interests in relation to the free speech values, the Court strikes an accommodation strongly favoring free speech. This result is discussed in subsection B. Having determined through *Virginia Pharmacy* that commercial speech merits protection under the First Amendment, the question of where commercial speech fits within free speech theory is examined next.

In subsection C, this article concludes that the principle holding all speech of equal value should prevail in most cases, but that an expansive view of the First Amendment necessitates selective exceptions for lesser status speech, as in the case of commercial speech. Still, any breach of the equal value principle is justifiable only for a compelling rationale. Subsection D argues that this criterion is satisfied in the case of commercial speech because of its lower intrinsic value, its speech plus conduct character, and its dissemination in a manner that is not value free. Accounting for the tension between the value of free speech generally, and its lesser worth when proposing a commercial transaction,¹² the section concludes that commercial speech merits an intermediate level of protection.

Part IV focuses on the accommodation of free speech values made in the commercial context. This section sets forth the practical reasoning model to be applied to commercial speech. The model consists of three general rules designed to sort out the in-

11. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

12. The prevailing definition of commercial speech is speech that "proposes a commercial transaction." *Fox*, 492 U.S. at 473. See also *infra* notes 131-42 and accompanying text.

nate tensions in commercial speech, thereby guiding analysis in this area. The three rules are: (1) truthful, nondeceptive, noncoercive speech may not be regulated except in the face of truly compelling governmental interests; (2) truthful speech that carries elements of deception, coercion, duress, harassment or similarly substantial interests may be regulated when government proves (a) the presence of a substantial interest, (b) the regulation directly advances the asserted interest, and (c) the restriction on speech is no greater than necessary to serve the interest; and (3) false information may be regulated.

Finally, in Part V, the article applies the practical reasoning methodology to several problems in commercial speech including advertisement in the professions, corporate speech, targeted advertising and mailings, in-person solicitation and persuasive advertising in the electronic media. The goal here is to demonstrate the pragmatic approach in one area of free speech, thereby providing further content to the Middle Ground vision. In applying practical reasoning to resolution of commercial speech issues, this section illustrates how the balance should be struck between free speech values and substantial governmental interests in the commercial context. The section provides both an approach to guide principled analysis in commercial speech that can be useful to judges and other decisionmakers who must actually resolve these cases and a methodology useful to general First Amendment issues.

I. THE LIMITS OF GRAND THEORY

The arguments for and against Grand Theory have been so well developed that there is little need to recapitulate them here.¹³ Instead, this section will summarize these arguments in order to portray the context in which the Middle Ground vision has evolved.

The search for the Grand Theory has generated a remarkable

13. A sampling of the voluminous commentary on Grand Theory includes MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH*, ch. 1 (1984); JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* §§ 16.6-16.7 (3d ed. 1986); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 6 (1982); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* 141-42 (1990); LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-1 to 12-2 (2d ed. 1988); Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317 (1988); Farber & Frickey, *supra* note 5; Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1982).

outpouring of scholarship over the last 20 years.¹⁴ All of these scholars have been seeking the same elusive goal — describing the central meaning of the First Amendment in terms of foundational values in attempts to build a unified theory of the Amendment. These efforts have been impressive, and they have much to teach us.¹⁵

Professors Meiklejohn and Emerson precipitated this ongoing debate in their classic theories of the First Amendment. Professor Meiklejohn viewed the First Amendment in terms of only one main value, self-government. Meiklejohn perceived self-government as the process by which expression can form, inform and express the public will so that citizens will actively be able to “self-govern.”¹⁶ Meiklejohn later accepted a more elaborate definition of speech that encompassed arts, literature and academic work, though he still considered these forms of speech “political” in that they helped form the public will necessary for effective political expression and self-government.¹⁷

Professor Emerson outlined four broad categories of values that a system of free speech encourages: “(1) assuring individual self-fulfillment, (2) advancing knowledge and discovering truth, (3) provid[ing] for participation in decisionmaking by all members of society, and (4) achieving a more adaptable and hence a more stable community . . . maintaining the precarious balance between healthy cleavage and necessary consensus.”¹⁸ Although distinct, “[e]ach is necessary, but not in itself sufficient, for the four of them are interdependent.”¹⁹ In recognizing the multi-valued, interdependent content of the First Amendment, Emerson presaged the Middle Ground vision as, indeed, he did much of modern free speech theory.

14. This work includes BAKER, *supra* note 7, THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970), and REDISH, *supra* note 6, and is discussed *infra* text accompanying notes 18-39.

15. Indeed, Professor Kalven noted that the “quest for coherent general (first amendment) theory . . . needs no apology and no defense.” HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 4 (1965) (cited in Farber & Frickey, *supra* note 5, at 1615 n.1).

16. MEIKLEJOHN, *supra* note 8, generally and especially at 9, 27, 55, 255.

17. *Id.* at 263; Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263.

18. EMERSON, *supra* note 14, at 7; see also THOMAS EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1963).

19. Thomas Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 423 (1980).

The classic Meiklejohn and Emerson theories have been worked and reworked by modern scholars. Many still see the pre-eminent value of free speech in terms of Meiklejohn's political speech model. Chief among these adherents are Professors BeVier,²⁰ Bickel²¹ and Bork.²² Others seem to have built mainly on Emerson's multi-valued framework, but moved beyond it in very original ways. Among the most original and convincing of recent theories are those of Professors Redish and Baker.²³

Professor Redish defines the First Amendment in terms of only one true value, self-realization. Self-realization includes both "the inherent value in allowing individuals to control their own destiny, and the instrumental value in developing individuals' mental faculties so that they may reach their full intellectual potential."²⁴ All expression is therefore ultimately a form of self-realization; all expression enhances self-realization either by facilitating speaker self-expression or by providing listeners with information they need to enhance their own self-realization. Self-realization is thus both intrinsically valuable as the means by which one achieves control over life and "life-affecting decisions," instrumentally valuable in encouraging the development of other important values, like rationality and autonomy.²⁵ With self-realization as the

20. Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 308-09 (1978) (acknowledging, however, the Court may be justified in extending First Amendment protection to categories of speech other than strictly political in order to protect political speech).

21. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 62-63 (1975).

22. Former Professor and Judge Bork first argued that the First Amendment protects only explicitly political speech, excluding from its protection art, literature, science and academic work. Bork, *supra* note 8, at 22. Later, as Judge, Bork seemed to move beyond this confined view of the Amendment. See, e.g., *Ollman v. Evans*, 750 F.2d 970, 993-1010 (D.C. Cir. 1984) (Bork J., concurring) (defending broadly the Supreme Court's constitutional protection of libelous speech), *cert. denied*, 471 U.S. 1127 (1985).

23. Other important theories not discussed here include Dean Bollinger's tolerance theory, LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 9-10 (1986) (extrapolating the 'social value in tolerance of extremist speech to other types of social encounters), and Professor Blasi's pathological perspective, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-50 (1985) (arguing that the First Amendment should "do maximum service . . . when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically").

24. Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 679-80 (1982); see also REDISH, *supra* note 6, at 30.

25. REDISH, *supra* note 6, at 11-13. Other relevant work of Professor Redish includes, Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense*

core value, the First Amendment can be seen as supporting a host of other values such as dignity, liberty, democracy, arts, literature and truth.

Linked inextricably in many ways to Professor Redish's theory is Professor Baker's "liberty model" of free speech. Professor Baker's model "delineates a realm of individual liberty, freedom and choice roughly corresponding to noncoercive, nonviolent action."²⁶ He sees the central meaning of the First Amendment, accordingly, in terms of "protected liberties [which] promote self-realization . . . and self-determination . . . and which . . . emphasize[] people's self-fulfillment and participation in societal change" free from inhibiting social and cultural influences.²⁷ Professor Baker asserts that "the values supported or functions performed by protected speech result from that speech being a manifestation of individual freedom and choice."²⁸

There is certainly much to admire in the work of Professors Redish and Baker. Yet all of these modern First Amendment theories, however grand, seem to have run up against certain hard, irreducible facts that in some way make the fit of facts to theory incompatible. With the exception of Professor Redish, none of the theories account for the totality of free speech.²⁹ Each poses com-

of *Clear and Present Danger*, 70 CAL. L. REV. 1159 (1982); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984) (examining the theory, ambiguities and inconsistencies of the prior restraint doctrine and its effect on First Amendment rights); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (concluding that the ultimate value of free speech is self realization) [hereinafter Redish, *Free Speech*]; Martin H. Redish, *The Warren Court, the Burger Court, and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031 (1983).

26. BAKER, *supra* note 7, at 47; see also C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (developing a liberty theory of speech due to the inadequacies of the classic and market theories).

27. C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 658 (1982); see also BAKER, *supra* note 7, at 48.

28. C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) [hereinafter Baker, *Commercial Speech*]. See also C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1981) (contrasting his theory to market-based theories and concluding that his theory promotes First Amendment protection of individual liberties that must be protected by a government in order to claim legitimacy).

29. For example, the theories of Professors Baker, Meiklejohn and Emerson exclude commercial speech from the First Amendment. See, e.g., BAKER, *supra* note 7, at 194-229; MEIKLEJOHN, *supra* note 8, at 87; EMERSON, *supra* note 14, at 311 & 348 n.93. Indeed, Meiklejohn's original theory categorically excluded all speech other than that relat-

plex theoretical difficulties³⁰ and each contains practical difficulties.³¹

ed directly to self-government. See *infra* note 30. This view attracted a wide following. See, e.g., BeVier, *supra* note 20; Bork, *supra* note 8.

30. Taking these in the order presented, the most obvious theoretical difficulty posed by Professor Meiklejohn's theory was his radically reductionist view of speech in terms only of political speech, and the resulting exclusion of art, literature, science and academic work. See *supra* note 16 and accompanying text. Later, of course, he attempted to fix this defect by including such speech within his theory. See *supra* notes 16-17 and accompanying text. However, this altered view of speech highlights another defect in his theory, the absence of any principled definition delimiting the concept of political speech. BAKER, *supra* note 7, at 26, 33. Detailed critiques of Meiklejohn's theory include REDISH, *supra* note 6, at 14-29; Zechariah Chafee Jr., Book Review, 62 HARV. L. REV. 891 (1949); Schlag, *supra* note 13, at 675 n. 13, 707-11; Steven H. Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1225-39 (1983) (critiquing Meiklejohnian political-based approaches, including those of modern adherents like Professors Jackson, Jeffries, Bork and BeVier).

One theoretical difficulty posed by Professor Emerson's theory is his dichotomy between action and expression. This dichotomy has been a source of confusion for readers and has posed serious difficulties in application, resulting in "Emerson's denial of first amendment protection in some concrete situations . . ." Schlag, *supra* note 13, at 722, 724. An extensive critique of Emerson's theory may be found at *id.* at 721-26. See also BAKER, *supra* note 7, at 70-71; TRIBE, *supra* note 13, at 788-89; Shiffrin, *supra*, at 1283.

Professor Redish's theory is the most comprehensive and attentive to the needs of society. Nevertheless, one theoretical difficulty posed by his approach is his desire to describe all of First Amendment reality in terms of his ultimate value, self-realization. This leads him to assert confidently that he

rejects those authorities (1) who believe that the First Amendment is multivalued, whether they superimpose a hierarchy upon those values or recognize them as interdependent coequals; (2) who argue that the First Amendment is single-valued with that value being something other than individual self-realization; (3) who, although accepting the self-realization value or its rough equivalent as the sole determinant of free speech, refuse to acknowledge one or more of the various subvalues that derive from it; and (4) who believe that total reliance on something akin to the self-realization value is inconsistent with any form of constitutional balancing process with regard to free speech.

REDISH *supra* note 6, at 13. In addition, Professor Redish argues that "although recognition of the self-realization value leads to the view that all forms of expression are equally valuable for constitutional purposes, this does not necessarily imply that all forms of expression must receive absolute, or even equal, protection in all cases." *Id.* For extended critiques of Redish's theory, see Baker, *supra* note 27; Farber & Frickey, *supra* note 5, at 1621-24; Schlag, *supra* note 13, at 726-30 (discussing Redish among other marketplace theorists).

Baker's innovative liberty theory focuses exclusively on the source of speech as a "charter of liberty for noncoercive liberty." Baker, *Commercial Speech*, *supra* note 28, at 7. This focus, however, is insufficiently attentive to social needs. Two glaring theoretical difficulties are Baker's insufficient attention to traditional audience or listener rights and his rejection of any marketplace theory. These insufficiencies are detailed in Redish, *Free Speech*, *supra* note 25, 620-21. Another "problem with Baker's approach is that it rests on a body of knowledge antithetical to liberal political philosophy . . . [and] rests on the view that current forms of social organization severely restrict the arena where individuals are free to pursue their own ends and values." Schlag, *supra* note 13, at 720-21. Detailed

In addition, the approach of Grand Theory is at odds with human reason and traditional judicial analysis of free speech questions.³² Grand Theory requires essential agreement over seminal principles prior to discussion of specific problems. It requires "replacement of the practical question as to how to resolve" conflicts of competing values "with the purely normative question" as to "what is the right value from which to reason deductively toward solution" of problems.³³ However, there has been significant disagreement as to what is the right value.

In contrast to Grand Theory, courts do not necessarily discern, nor promote ultimate values. Rather, their function is to decide

critiques of Baker's theory include REDISH, *supra* note 6, at 49-52; Farber & Frickey, *supra* note 5, at 1619-21 (Baker's theory both extends the First Amendment too far in some instances and contracts protection too narrowly in other instances); Schlag, *supra* note 13, at 711-21.

31. All of these Grand Theories suffer from "astigmatism," of striving to fit all of reality into the theory and, accordingly, "twisting . . . phenomena to fit preordained categories." Schlag, *supra* note 13, at 737. This "distorts the relationship between values and applications . . . lead[ing] to highly dubious applications" Farber & Frickey, *supra* note 5, at 1641. Of course, this is not due to any lack of brilliance. Rather, the problem is the seduction of Grand Theory and its "Procrustean Demands." *Id.* at 1623. Nevertheless, the inability "to provide sensible answers to concrete problems . . . is an important failing in . . . legal theory, since a major purpose of legal theories is to guide courts in deciding individual cases." *Id.* at 1626.

Examples of such practical difficulties in each of these Grand Theories include Professor Meiklejohn's initial exclusion and subsequent inclusion, through reformulation of his theory, of such speech as art, literature and science. See *supra* notes 29-30 and accompanying text.

An obvious pragmatic difficulty in Professor Emerson's theory is his "denial of first amendment protection in some concrete situations (for instance, some solicitations to criminal action and some invasions of privacy)." Schlag, *supra* note 13, at 724.

Professor Redish generally avoids "any truly horrible results" through his general balancing test. Farber & Frickey, *supra* note 5, at 1622-23. Nevertheless, "his ambition to wrap up all of the first amendment in one tidy package distorts his thinking," at least at times. *Id.* at 1623-24. One example is his extension of qualified constitutional protection to certain murder proposals made in the service of an ideological cause. *Id.* at 1623.

The most glaring difficulty presented by Professor Baker's theory is its rejection of much of social reality. See *supra* note 30 and accompanying text. Specific concrete difficulties include rights to use heroin and engage in espionage. See Farber & Frickey, *supra* note 5, at 1620.

32. "[G]rand theory is based on a misapprehension of the nature of human reason By confining reason to logical deduction from set premises, [grand theory] . . . curtails the use of our most powerful problem-solving abilities." Farber & Frickey, *supra* note 5, at 1617. A growing body of philosophers and law professors believe foundationalism limits human reason. See *id.* at 1639-45. Indeed, "accepting . . . ontological predicates . . . requires us to reject the basic framework for First Amendment decisionmaking used by courts." Cass, *supra* note 13, at 1328.

33. Cass, *supra* note 13, at 1327.

cases in keeping with the constitutional prohibition against restraints on expression.³⁴ In performing this function, judges are wisely informed as to the values at issue. Here Grand Theory has made immeasurable contributions in illuminating these values. Nevertheless, foundational values are only part of what comprises the First Amendment.³⁵

The purpose here is not to demonstrate the failings of Grand Theory; others have done that well.³⁶ Rather, the intent is to focus attention on the limits of Grand Theory and the need to shift direction in the focus of current work in free speech theory.

The grand but ultimately unsuccessful quest of Grand Theory seems to suggest that the paradigm of foundational values is beyond our reach. The very magnitude of the task is daunting.³⁷ We might do better to focus our efforts on more practical and attainable solutions. Indeed, much can still be done "to sharpen, to clarify, and to criticize our underlying intuitions."³⁸

Because we seem to have reached the limits of Grand Theory, we should move toward a broader and more satisfying vision of free speech. That direction is the Middle Ground, between the lofty realm of Grand Theory and the unsatisfying alternative of ad hoc

34. *Id.* ("Courts generally have viewed their task not as promoting ultimate human values, but as implementing a constitutional prohibition that may be informed by concern for such values.").

35. Indeed, "courts have not found any single value consistently compelling, advertent instead to a group of values notwithstanding the tension inherent among values such as self-development, truth, democracy, and social stability." *Id.* at 1328. *Accord* Shiffrin, *supra* note 30, at 1252.

36. In particular, *see* Cass, *supra* note 13; Farber & Frickey, *supra* note 5; Schlag, *supra* note 13; Shiffrin, *supra* note 30. Each new theory sets off another round of critique, reformation and ultimately retrenchment. Practical reason is offered here as one "way out of this downward spiral," which otherwise could result in "absolute skepticism about judicial outcomes" and legal theory. Farber & Frickey, *supra* note 5, at 1645.

37. Indeed, as Professors Farber & Frickey state:

Our discussion does not, of course, prove that a general theory is an impossibility. Still, when Baker, Redish, and Bollinger — not to mention Emerson, Meiklejohn, Ely, and Tribe — have all undertaken a task and failed, the problem is obviously not lack of intellectual ability. Perhaps the enterprise as a whole needs to be rethought.

Farber & Frickey, *supra* note 5, at 1626-27 (footnotes omitted).

Professors Farber & Frickey worry that "the failure of grand theory may simply collapse legal scholarship into absolute skepticism about judicial outcomes, that judge-made law consists merely of judicial personal preferences." *Id.* at 1645. Professor Shiffrin notes, simply, that "system building aspires beyond the possibilities offered by the raw material." Shiffrin, *supra* note 30, at 1254.

38. Shiffrin, *supra* note 30, at 1254.

balancing.³⁹

II. THE MIDDLE GROUND

In place of foundationalism, the time now seems ripe to focus attention on constructing a new, nonfoundational paradigm, referred to here as the Middle Ground.

A. The Movement Toward The Middle Ground

The movement toward nonfoundationalist knowledge has much in common with broader intellectual movements, particularly in science and philosophy.⁴⁰ Lessons from moral philosophy are especially insightful. The premises of intuitionism closely match the quest for the Middle Ground. According to John Rawls, "the intuitionist believes . . . that the complexity of the moral facts defies our efforts to give a full account of our judgments and necessitates a plurality of competing principles."⁴¹ He contends that attempts to go beyond these principles either reduce to triviality . . . or else lead to falsehood and over-simplification."⁴² The pragmatic approach to the First Amendment "is intuitionist because it posits that there are limits to the level of generality we can achieve in free speech theory without falling into triviality or falsehood."⁴³

Much recent important legal commentary has also suggested a movement away from Grand Theory toward something new, variously called "intuitionism,"⁴⁴ "prudence," "prudential reasoning,"⁴⁵ "pragmatism"⁴⁶ and "practical reasoning."⁴⁷ The range of

39. See Farber & Frickey, *supra* note 5, at 1627 ("There is such a thing as thinking too small.").

40. Farber, *supra* note 3, at 1335-37. Note the work of the following in furthering this movement away from Grand Theory: in science, THOMAS S. KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* (1977); THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (exploring the history of science by examining developments against the scientific background of their time, rather than against the accumulation of all scientific knowledge); in philosophy RICHARD J. BERNSTEIN, *PHILOSOPHICAL PROFILES* (1985); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* (1981); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

41. JOHN RAWLS, *A THEORY OF JUSTICE* 39 (1971).

42. *Id.*

43. Shiffrin, *supra* note 30, at 1254.

44. Steven H. Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1192-1215 (1983); see Farber, *supra* note 3, at 1334-37.

45. See, e.g., Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1567-73 (1985).

46. Farber, *supra* note 3; Robin L. West, *Liberalism Rediscovered: A Pragmatic Defi-*

scholarship in this area is impressive, covering republicanism,⁴⁸ legal history,⁴⁹ general legal reasoning,⁵⁰ statutory interpretation,⁵¹ moral philosophy,⁵² legal ethics⁵³ and constitutional interpreta-

tion of the *Liberal Vision*, 46 U. PITT. L. REV. 673, 726-38 (1985) (arguing that a liberal pragmatist stance toward constitutional issues is preferable to intuitionism because of the former's optimism about humanity's potential for providing moral guidelines).

47. Farber & Frickey, *supra* note 5, at 1639-56; Frank I. Michelman, *The Supreme Court 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-36 (1986) (arguing that the republican premise of practical reason was rightly adopted by Justice O'Connor's dissent in *Goldman v. Weinberger*, 475 U.S. 503 (1986)); Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45 (1985).

48. Michelman, *supra* note 47, at 17-55 (examining and evaluating various facets of republicanism and its application to constitutional interpretation); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 543-44 (1986) (arguing that values such as community and virtue are both inherent in Jeffersonian republicanism and feminine jurisprudence and ought to supplant masculine liberalism when interpreting the Constitution); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 68-75 (1985) (arguing that Madisonian republicanism should be used by the courts when they review legislative and administrative laws); Cass R. Sunstein, *Legal Interference With Private Preferences*, 53 U. CHI. L. REV. 1129, 1134-35 (1986) (arguing that the political process should invoke Madisonian republicanism, which advocates that government should select preferences through deliberation and debate rather than from factional pressures).

49. See, e.g., Anthony D'Amato, *Lon Fuller and Substantive Natural Law*, 26 AM. J. JURIS. 202 (1981) (criticizing Fuller's thesis equating natural law and morality); Kronman, *supra* note 45 (analyzing the work of Alexander Bickel); Peter R. Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073 (1986) (defending the work of Lon Fuller).

50. See, e.g., STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 132-38, 170-71, 181-85 (1985) (arguing that the law, by necessity, is interpreted pragmatically since any principle of law must find legitimacy with the people); James Gordley, *Legal Reasoning: An Introduction*, 72 CAL. L. REV. 138, 160-62 (1984) (exploring situations in which a legal authority would apply a pragmatic approach in interpreting the law); Shiffrin, *supra* note 44, at 1215 (advocating "adjust[ment of] theory to practice and practice to theory"); Wellman, *supra* note 47 (asserting that practical reasoning is preferable to deductionism and analogizing, which are too limiting for legal reasoning).

51. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 613-35 (1988) (explaining the dynamic model of statutory interpretation and contrasting it with textualist and intentionalist models); William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1497-1538 (1987) (responding to arguments supporting static statutory interpretation by advocating a dynamic model which would not necessarily defer to legislative expectations in every case); William N. Eskridge & Philip Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321-22 (1990); Philip Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990).

52. See, e.g., RAWLS, *supra* note 41; David A. J. Richards, *Moral Theory, The Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL EDUC. 359, 359 (1981) (examining the interdisciplinary relevance of developmental psychology and

tion,⁵⁴ in addition to First Amendment scholarship.⁵⁵ There are many familiar strains among this diverse outpouring. These include

a concern for history [society, community] and context; a desire to avoid abstracting away the human component in judicial, [ethical and individual] decisionmaking [and judgment generally]; an appreciation of the complexity of life [and human nature]; some faith in dialogue and deliberation; a tolerance for ambiguity, accommodation and tentativeness, but a skepticism of rigid dichotomies; and an overall humility.⁵⁶

All are linked to the American tradition of pragmatic reasoning and common law methodology, of building from the ground up.⁵⁷ This approach favors "situat[ional] practical judgment," mediating "between the general standard and the specific case" so that rules will emerge over time with a concrete meaning.⁵⁸ The approach

moral philosophy to legal education, especially to ethical reasoning).

53. Edward J. Eberle, *Toward Moral Responsibility in Lawyering: Further Thoughts on the Deontological Model of Legal Ethics*, 64 ST. JOHN'S L. REV. 1 (1989) (explaining the deontological model of legal ethics and its application as a means of improving congruity between ethical rules and moral norms).

54. Farber, *supra* note 3. See *infra* notes 60-63 and accompanying text. See also Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1138 n.3 (1983) ("A theory of freedom of expression is, in part, an aspect of a theory of practical reason.").

55. See *infra* notes 60-63 and accompanying text.

56. Farber & Frickey, *supra* note 5, at 1646 (footnote omitted).

57. Like Professor Farber, "I use the term *legal pragmatism* for the nonfoundational approach to law. This term highlights the connection between the new turn in legal thought and the American pragmatist philosophers." Farber, *supra* note 3, at 1337. Relevant work in the American tradition of pragmatic reasoning, noted by Professor Farber, *id.* at 1341-42 & nn. 52, 53, includes JOHN DEWEY, *ART AS EXPERIENCE*, 85, 117, 344-46 (1934) ("the value of art rests in its ability to enrich the human experience"); WILLIAM JAMES, *PRAGMATISM* 31 (1975) ("A pragmatist . . . turns away from abstraction and insufficiency, from verbal solutions, from bad *a priori* reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action, and towards power . . ."); and OLIVER W. HOLMES, *THE COMMON LAW* 213 (1881) ("Law, being a practical thing, must found itself on actual forces.").

58. Michelman, *supra* note 47, at 28-29; see also THOMAS NAGEL, *MORTAL QUESTIONS* 135 (1979):

[J]udgment — essentially the faculty Aristotle described as practical wisdom, . . . reveals itself over time in individual decisions rather than in the enunciation of general principles

[W]e should [not] abandon the search for more and better reasons and more critical insight in the domain of practical decisions. It is just that

also favors "situation sense": the ability to take a complex set of facts, identify the key relevant attributes, and understand their societal significance."⁵⁹

B. The Middle Ground

The groundwork for the Middle Ground has been laid by Professors Farber, Frickey,⁶⁰ Schauer,⁶¹ and Shiffrin,⁶² among oth-

our capacity to resolve conflicts in particular cases may extend beyond our capacity to enunciate general principles that explain those resolutions. Perhaps we are working with general principles unconsciously, and can discover them by codifying our decisions and particular intuitions.

Indeed, "if total objectivity is not humanly attainable, something less may still suffice."

Farber & Frickey, *supra* note 5, at 1652 (footnote omitted).

Justice Brennan seems to capture the human dilemma well:

The struggle for certainty, for confidence in one's interpretative efforts, is real and persistent. Although we may never achieve certainty, we must continue in the struggle, for it is only as each generation brings to bear its experience and understanding, its passion and reason, that there is hope for progress in the law.

William J. Brennan Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 12 (1988).

59. Farber & Frickey, *supra* note 5, at 1635 (citing KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 268-85 (1960)). Professors Farber & Frickey continue:

Having done so, the judge could approach the case as an example of a broader situation, giving the peculiar facts of the case some weight but assessing them in regard to the broader implications of the case. The judge could then decide the case, not by deductive logic, but by a less-structured, problem-solving process involving common sense, respect for precedent, and a sense for society's needs. Such a decision would not be limited to the peculiar facts of a given case, but would necessarily give guidance to future cases involving the same life-reason. For some, this might seem an invitation to pure judicial policymaking, but Llewellyn had confidence in the power of craft and tradition to guide the judge's decision.

Id. at 1635-36 (footnotes omitted). Besides, as Professor Redish notes:

To be sure, such an analysis places a good deal of faith in the ability of judges to exercise their authority with wisdom and discretion, both in establishing and applying general rules of First Amendment construction, and where necessary, in engaging in *ad hoc* balancing. But, after all, that is what they are there for, and in any event we appear to have little choice.

REDISH, *supra* note 6, at 55.

60. See Farber, *supra* note 3, at 1377 (criticizing the Grand Theory and the foundational approach and advocating the theory of "legal pragmatism" as an approach to constitutional law based on a "satisfactory adjustment of . . . both social policy and traditional legal doctrines"); Farber & Frickey, *supra* note 5 at 1628 (asking "Is there any middle ground between unified theories and complete eclecticism?").

61. See SCHAUER, *supra* note 13; Frederick Schauer, *Commercial Speech and the Ar-*

ers.⁶³ The Middle Ground is an alternative view of the Amendment that assumes social reality is too complex to be reflected through any single value. To meet the needs of society, therefore, the Middle Ground considers many values and relies upon divergent tools and techniques to interpret the Amendment. The goal of the Middle Ground, in short, is to construct a more complete and satisfying vision of the First Amendment.

The Middle Ground builds on Grand Theory. It recognizes Grand Theory's important contributions to free speech theory, particularly in elucidating fundamental values and protecting the core speech supported by those values. But the Middle Ground goes beyond Grand Theory.

First, it is a broader approach to reality and endeavors to remain open to the diversity, dynamics, and fluidity of social reality.⁶⁴ Second, the Middle Ground does not recognize that any one value may be the only true value underlying the First Amendment.

Instead, a better way of viewing a value like self-realization is

chitecture of the First Amendment, 56 U. CIN. L. REV. 1181, 1203 (1988) (discussing the First Amendment in the context of commercial speech and suggesting that the danger of dealing with the First Amendment by incremental decisions is the potential loss of the "core" of the First Amendment) [hereinafter Schauer, *Architecture*]; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. U. L. REV. 265, 307 (1981) (concluding that for the time being, general categories are the most important way we have of incorporating the constitutionally mandated preference for free speech values into a "legal system populated by human beings of less than perfect ability and less than perfect insight") [hereinafter Schauer, *Categories*]; Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284 (1984).

62. See SHIFFRIN, *supra* note 13, at 655 (discussing various traditional approaches to restraints on government speech and concluding that "there are too many rights and interests worth 'taking seriously' to make the government speech problem an easy one to resolve"); Shiffrin, *supra* note 30; Steven H. Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 609-10 (1988) (advocating an eclectic approach to analyze government speech because "the search for single principles or all encompassing models yielding easy solutions is too often misdirected" due to the variety and complexity of government speech). "Yet for all its difficulties, the middle ground seems superior to the alternatives." Shiffrin, *supra* note 30, at 1253.

63. Other commentators arguing for nonfoundationalist approaches to the First Amendment include NIMMER, *supra* note 13 (discussing the history and theories of First Amendment free speech); Cass, *supra* note 13 (discussing various approaches to commercial speech and the First Amendment); Schlag, *supra* note 13 at 733 (criticizing categorical approaches to the First Amendment and discussing the possibility of a "four parameters" approach based on "content, source, manner and effect").

64. See REDISH, *supra* note 6, at 86 ("Although each of the existing theories (those of Meiklejohn, Emerson, Bork, Baker, Schauer, Blasi, traditional marketplace, Jackson and Jeffries) is correct as far as it goes, none sufficiently extends the scope of the constitutional protection.").

as one of "a web of mutually reinforcing values."⁶⁵ In other words, self-realization supports other important values, like democracy and free speech; but the converse is also true, democracy supports free speech and self-realization, and free speech supports self-realization and democracy, and so on.⁶⁶ These values are foundational in nature; they support themselves and a host of other values. But these values are supported by other values too in an interwoven web of values. This web of values better reflects the diversity, if not contrariness, of life that flows through the First Amendment prism and, yet, gives life meaning.⁶⁷

A web of values also better reflects the Supreme Court's approach to speech. The Court has consistently eschewed foundationalism in favor of a broad, multi-valued approach to the First Amendment.⁶⁸ After all, free speech urges many ideas in varied ways, supports and encourages innumerable other values and "performs a multitude of functions."⁶⁹ The web metaphor helps conceptualize this more encompassing view of expression.

A web of values, in turn, provides a means of transcending a purely ad hoc approach to speech questions. A web of values imbues the Amendment with a certain structure, coherence and consistency. It also establishes a measure of strength and dynamism.⁷⁰ To confront the complexity of life, the Middle Ground advocates use of all tools helpful to reaching satisfactory solutions of speech questions. Indeed, although preferring rules where possible, the Middle Ground proposes a distinctly eclectic approach to

65. Farber & Frickey, *supra* note 5, at 1640.

66. *Id.*

67. "[A] web of values . . . collectively compris[es] our understanding of how people should live." *Id.* at 1641.

68. See Cass, *supra* note 13, at 1327-28 ("[C]ourts have not found any single value consistently compelling, adverting instead to a group of values notwithstanding the tensions inherent among values such as self-development, truth, democracy and social stability.").

69. Baker, *Commercial Speech*, *supra* note 28, at 6.

70. The difference between the Middle Ground and Grand Theory can also be analogized to a skyscraper supported by many piles of steel and reinforced concrete as compared to the foundationalist tower representing one majestic value reaching toward the heavens. In the winds of changing social and empirical reality, the skyscraper has a better chance of remaining upright than the tower. Importantly, the configuration of First Amendment values, like the configuration of building supports, provides "a basis for broader social consensus." See Farber & Frickey, *supra* note 5, at 1642-43. To the extent the Amendment is defined in terms only of selective values, support for the Amendment will falter if those values are rejected.

the First Amendment.⁷¹

The Middle Ground does not, therefore, reject deductive reasoning from foundational principles. Rather, it incorporates deductionism as one of several approaches to the Amendment. Deductionism from foundational principles may provide the right answer in many cases. Indeed, deductionism from the foundational principles of free speech categorically yields the right answers to most questions concerning core speech areas.⁷²

On the other hand, strict reliance on deductionism presents dangers, including that of "abstracting away the [vital] human component."⁷³ Definitional balancing may better accommodate some human interests, like certain rights of privacy.⁷⁴ For example, definitional balancing can better mediate between true speech and freedom from invasive commercial advertising techniques.⁷⁵

Reasoning by analogy may also often provide insight, as this

71. Shiffrin, *supra* note 30, at 1252-53. Professor Shiffrin has generally argued for an eclectic approach to the First Amendment. *Id.*; SHIFFRIN, *supra* note 13. The Supreme Court might also be characterized as employing this approach. Note, for example, the philosophy of Justice Brennan:

The framers bequeathed to us a vision of rulers and the ruled united by a sense of their common humanity [W]e cannot console ourselves with the belief that reliance on formal rules alone is ever sufficient to be faithful to the vision of the framers. The Constitution demands the full measure of *all* our human capacities, not merely from judges, nor from rulers, but from our ultimate sovereign - the people.

Brennan, *supra* note 58, at 22-23; *cf.* authorities cited *supra* note 32.

72. See *infra* notes 282-84, 330-47 and accompanying text.

73. Farber & Frickey, *supra* note 5, at 1646.

74. For example, the right to be free from defamation and libel as mediated by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was thought by Professor Nimmer to be a classic case of definitional balancing. NIMMER, *supra* note 13, § 2.03 at 2-15 to 2-16. As Professor Nimmer explains elsewhere:

Times points the way to the employment of the balancing process on the definitional . . . level. That is, the Court employs balancing not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech are to be regarded as "speech" within the meaning of the first amendment.

. . . .
 . . . By in effect holding that knowingly and recklessly false speech was not "speech" within the meaning of the first amendment, the Court must have implicitly (since no explicit explanation was offered) referred to certain competing policy considerations.

Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942-943 (1968) (footnotes omitted).

75. See *infra* notes 269-84, 330-408 and accompanying text.

article generally demonstrates through *Virginia Pharmacy*.⁷⁶ The right answer may even arise on rare occasion from ad hoc balancing, as it does with respect to some false commercial speech.⁷⁷ Often the answer arises from a combination of methodologies or arguments. Values interact with social reality in complicated ways, and the search, therefore, must be for the best answer to the problem at hand.⁷⁸

C. Practical Reason

Applying practical reason is a main task of the Middle Ground because practical reason appears to offer the best means for achieving sound and reliable answers to First Amendment questions. Practical reasoning is principled yet flexible. It is principled because it can found general rules on reasonably reliable objectives grounded in our tradition of free speech and, thereby, guide analysis and cabin discretion within these objectives.⁷⁹ It also offers consistency in application in deference to those objectives.⁸⁰ It is flexible because it can adjust to mediate the particular case in relation to the general standard.⁸¹ Practical reasoning is especially good at harmonizing competing values.⁸² Given the disappointing results of much judicial reasoning, especially its discretionary tone and general inability to harmonize values,⁸³ practical reasoning

76. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). As Professors Farber & Frickey similarly demonstrate, *New York Times* "illustrates the existence of a middle ground between general theory and *ad hoc* eclecticism." Farber & Frickey, *supra* note 5, at 1637.

77. See *infra* notes 303-06, 441-42 and accompanying text.

78. "The search, then, is for contextual justification for the best legal answer among the potential alternatives." Farber & Frickey, *supra* note 5, at 1647. This "problem of the relation of law and society is not the sort of issue which can be 'solved' by some 'theory' and then passed over. It is . . . one of the 'permanent problems of the law.'" Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 453 (1934), *quoted in* Farber & Frickey, *supra* note 5, at 1647 n.138.

79. See *infra* notes 281-306 and accompanying text (Part IV).

80. See *infra* notes 307-442 and accompanying text (Part V).

81. "[P]ractical reason can accommodate shifting understandings of empirical reality; foundational theories premised on certain empirical assumptions cannot." Farber & Frickey, *supra* note 5, at 1647.

82. See *infra* notes 307-442 and accompanying text (Part V).

83. See *infra* text accompanying notes 330-64 (discussing *Posadas de Puerto Rico Ass'n v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), and *Board of Trustees v. Fox*, 492 U.S. 469 (1989)). For evaluation of modes of legal analysis, see Wellman, *supra* note 47, *passim* ("[A] theory of judicial justification in terms of practical reasoning is preferable . . . to a theory in terms of deduction or analogy." *Id.* at 63.).

may be our best hope at present for reaching a broad range of reliable First Amendment outcomes.

Some lessons of moral philosophy are again illuminating, here in providing additional content and coherence to practical reasoning.⁸⁴ W.D. Ross argued that moral conflicts can arise in deontological theory, a theory of ethics that recognizes that "some acts are morally obligatory regardless of their consequences for human happiness."⁸⁵ According to Ross, "it is incoherent to insist upon universal validity of any one moral rule to the exclusion of all others."⁸⁶ For example, the moral obligation to maintain a confidence cannot always displace other competing moral values, such as the duty to warn innocent third parties of imminent and serious harm.⁸⁷ Instead, Ross' approach was to recognize moral conflicts and then seek to resolve them. When a conflict between competing moral values arises, it is necessary to analyze the situation critically so that it may be resolved in an ethically satisfying manner.⁸⁸

Rawls characterized this approach as "intuitionism."⁸⁹ By intuitionism, Rawls meant a doctrine containing "an irreducible family of first principles which have to be weighed against one another by asking ourselves which balance, in our considered judgment, is the most just."⁹⁰ Ross viewed this problem as one of distributive justice calling for the distribution of goods according to moral worth. But "while the principle to produce the most good ranks as a first principle, it is but one such principle which must

84. "[I]f [practical reasoning] is to offer a meaningful alternative to foundationalism, it must be given some content [in order to] transcend *ad hoc* eclecticism and create a coherent legal tradition." Farber & Frickey, *supra* note 5, at 1616-17.

85. Anthony D'Amato & Edward J. Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS U. L.J. 761, 772 (1983) (citing WILLIAM K. FRANKENA, *ETHICS* 16-17 (2d ed. 1973)).

86. *Id.* at 773 (citing WILLIAM D. ROSS, *THE RIGHT AND THE GOOD* (1939)).

87. See Eberle, *supra* note 53, at 16-17 (citing IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 39 (Lewis W. Beck trans., 2d ed. 1959)). Kant used the following as an example:

[An individual] who intends to murder your sister asking you if your sister is at home. If in fact she is at home, Kant requires that you tell the truth and answer in the affirmative. Later, pressed by his students, Kant further explained that if you answer truthfully, the would-be murderer would probably not believe you!

D'Amato & Eberle, *supra* note 85, at 772.

88. Eberle, *supra* note 53, at 17.

89. See *supra* notes 41-43 and accompanying text.

90. RAWLS, *supra* note 41, at 34. Here, Rawls views intuitionism "in a more general way than is customary." *Id.*

be balanced by intuition against the claims of the other *prima facie* principles."⁹¹ Accordingly, when presented with a conflict between competing moral claims one must try to find a "constructive answer . . . to the problem[] of assigning weights to competing principles of justice."⁹² This has been named the "priority problem" in moral philosophy.

One tool to help achieve a coherent answer is provided by lexicographical reasoning. Lexicography calls for a serial or lexical ordering of values. It "requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on."⁹³ In this manner, Ross ranked moral worth as lexically superior to nonmoral values, a classic example of lexicographical reasoning in moral philosophy. On this basis, moral rules outweigh nonmoral values, but they may conflict with other moral rules. When moral rules conflict with other equally weighted moral rules, the conflict must be evaluated and resolved in an ethically satisfying manner through intuitive reasoning.⁹⁴

Still, the obvious danger in using lexicography is that principled results may not be obtained simply by applying "intuitionism" to the resolution of moral conflicts. In our world there is almost always a "plurality of principles" which must be balanced in determining which single principle in the plurality is "most just." This balancing inevitably requires the exercise of some discretion.

But the problem is not irreducible.⁹⁵ Reliance on intuitionism can be reduced by substituting Rawls' prudential, rational judgment for "unguided" moral judgment.⁹⁶ Classic philosophers like Aristotle called this form of reasoning "practical judgment" or "practical wisdom."⁹⁷ Kant termed it "universal practical reasoning."⁹⁸ Contemporary constitutional and First Amendment scholars call it variously "practical reason," "prudential reasoning or judgment," or

91. *Id.* at 40 (citing WILLIAM D. ROSS, *THE RIGHT AND THE GOOD* 21-27 (1930)). Ross' theory is an intuitionist theory that is deontological. *Id.*

92. *Id.*

93. *Id.* at 43.

94. WILLIAM D. ROSS, *THE RIGHT AND THE GOOD* 149-54 (1930).

95. Eberle, *supra* note 53, at 18-19.

96. RAWLS, *supra* note 41, at 44.

97. VI ARISTOTLE, *NICHOMACHEAN ETHICS* (Martin Ostwald trans. 1962).

98. IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 32-33 (Lewis W. Beck trans., 1976) (all moral concepts have their origin in practical, rational reasoning).

"intuitionism."⁹⁹

The task, then, in moral philosophy is one "of reducing and not of eliminating entirely the reliance on intuitive judgments."¹⁰⁰ It is unrealistic to think that all elements of discretion can be eliminated. Rather, "[t]he practical aim is to reach a reasonably reliable agreement" in judgment in order to provide a common conception of justice."¹⁰¹

The approach of moral philosophy, as described above, is functionally similar to modern First Amendment analysis. As in moral philosophy, the First Amendment contains many core values, but any one core value does not predominate over another. It is incoherent in the realm of First Amendment theory to insist upon the universality of any one value to the exclusion of others, as in moral philosophy. A web of values is preferable to a single strand representing one value. Therefore, First Amendment work should focus more on finding reasonably reliable solutions than universal answers.

Because free speech values do not exist in a void but interact with society in complicated ways, free speech must yield in certain limited circumstances to social regulation. In other words, while the First Amendment comprises a set of first order principles which will almost always prevail in core speech areas, free speech is nevertheless not absolute. Communitarian interests may represent important social values too, and may occasionally outweigh free speech values in certain limited circumstances.

In the face of such conflicts, the key question is how to reach a proper accommodation of speech values. Inevitably this is a question of balancing.¹⁰² But given the preferred value of free speech in our value structure, free speech must be given preference in any balancing. Otherwise, there is a danger that the First Amendment will be balanced away in favor of social interests in reaching results. That would be too small an approach to free speech.¹⁰³

Preference can properly be given to free speech through a form

99. See *supra* notes 41-47 & 60-63 and accompanying text.

100. RAWLS, *supra* note 41, at 44.

101. *Id.*

102. "In the final analysis, balancing is nothing more than a metaphor for the accommodation of values. Everyone balances — even Baker. The real debate is about how we should accommodate values in specific contexts." Shiffrin, *supra* note 30, at 1249.

103. Farber & Frickey, *supra* note 5, at 1627.

of weighted balancing which, as Professor Redish has said, means that one thumb on the scale should firmly favor expression.¹⁰⁴ In this sense weighted balancing is the right general approach to the "accommodation of values in [concrete] contexts."¹⁰⁵ In other words, the general rule to mediate the First Amendment ought to be that the Amendment trumps all concerns other than very strong governmental interests. How strong the interests need be to justify curtailment of free speech will inevitably depend on context.

Faced with the need to make such an accommodation, how can the proper balance be reached in the context of a concrete problem? Only by a critical evaluation of the problem. That is, by identifying the speech values at stake, evaluating them in relation to communitarian interests and forging the proper accommodation.

This analysis does not occur in a void. In the First Amendment realm, we can draw upon a rich tradition¹⁰⁶ to help reach reasonably reliable solutions. These solutions must be guided by a concern for the Constitution's language, structure, context and history, as well as by consideration for precedent (especially "paradigmatic judicial opinions"),¹⁰⁷ the limits of judicial review, social and

104. According to Professor Redish:

if we define "balancing" to include definitional balancing, as well as the ad hoc variety, we can see that the concept has gained a wide acceptance, for any general rule of First Amendment interpretation that chooses not to afford absolute protection to speech because of competing social concerns is, in reality, a form of balancing. The point, however, is to balance with "a thumb on the scales" in favor of speech.

Redish, *Free Speech*, *supra* note 25, at 624 (citations omitted).

Owen Fiss refers to this form of balancing as "weighted balancing." Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1419 (1986). "[F]ree speech lies so close to the core of our constitutional structure to warrant tipping the scales in its favor. In this regard the structuralist can confidently borrow the weighted balancing process used by progressives to protect speech in the interest of autonomy." *Id.*

Weighted balancing has generally taken the form of categorical or definitional balancing in First Amendment cases. It is not my purpose here to evaluate the relative merits and demerits of ad hoc, definitional, categorical or other forms of balancing. Excellent discussions of these forms of balancing include John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Nimmer, *supra* note 13; Schauer, *Categories*, *supra* note 61, at 273-76; Schlag, *supra* note 13, at 672-75.

105. Shiffrin, *supra* note 30, at 1249.

106. Professor Fiss rightly reminds us that we have a "Free Speech Tradition." Owen M. Fiss, *supra* note 104, at 1405. Of course, the "Tradition is flawed in some important respects. . . ." *Id.* at 1406. Thus, it is incumbent on us to draw out the best of the tradition to shape our future.

107. Farber & Frickey, *supra* note 5, at 1631. Professors Farber & Frickey exemplify

moral norms, concepts of justice and other "shared values, assumptions, and techniques."¹⁰⁸ Therefore, reason is not "unguided," but bounded by identifiable principles.¹⁰⁹ One key to achieving proper outcomes is developing the right "situation sense,"¹¹⁰ anchored in the First Amendment tradition.

Serial reasoning offers another valuable tool for cabining discretion and achieving coherent accommodations. Serial reasoning can be particularly useful in ordering categories of speech. In the first order of speech, most people would include political, religious and other ideological communication, artistic and literary expression, and academic and scientific expression.¹¹¹ Second order categories would include commercial speech, pornography, labor speech, defamation, offensive speech, and fighting words. Bottom level and unprotected speech would include obscenity and certain false statements of fact.

Similarly, important contextual concerns could be ranked. First order, or "compelling," governmental interests would include clear, present, imminent and serious dangers to the state order or to the public health, safety or welfare. Second order, or "substantial," interests would include speech that is deceptive, misleading or violative of certain human rights, like some privacy interests. Third order, "rational" interests would include such traditional concerns

this style of analysis with respect to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Farber & Frickey, *supra* note 5, at 1631-39. See also *infra* notes 131-98 (Part III(A)-(B)) (analyzing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 743 (1976) from this perspective and assessing its precedential value in the development of First Amendment jurisprudence).

108. Farber, *supra* note 3, at 1335 n.24.

109. As Justice Harlan stated in *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring):

Judicial self-restraint . . . will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.

110. See *supra* note 59 and accompanying text.

111. See Schauer, *Architecture*, *supra* note 61, at 1186. This first order of speech is the central core of the First Amendment. As Professor Schauer explains, the "first amendment has . . . several cores, explainable largely in terms of clusters of communicative conduct." *Id.* This central core is where, among other concerns, "government has demonstrated such a proclivity toward overregulation that compensatory underregulation is now necessary There may be other[] [cores] now, and there may be still more in the future." *Id.*

as maintaining streets and public facilities in a sanitary and workable fashion.

Evaluating speech questions in context could produce meaningful rules that would help to order analysis and ultimately provide more coherence and substance to free speech theory. For example, a first order principle like political speech would clearly outweigh a rational governmental interest like maintaining clean streets.¹¹² Similarly, first order speech would also outweigh a substantial interest like preventing misleading claims.¹¹³ However, that speech may not outweigh a truly compelling interest like a clear, present, imminent and serious danger to the social order. For example, "publication of the sailing dates of transports or the number and location of troops" during war time constitutes such a truly compelling interest.¹¹⁴ Conversely, a compelling governmental interest, like protecting the welfare of children, would clearly outweigh bottom-level speech like obscenity. Such an interest would also outweigh second level speech like pornography, and it might even outweigh first level speech like artistic expression in certain contexts.¹¹⁵ These are all relatively easy cases. Nevertheless, they

112. See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939) (concluding that a municipality may regulate conduct of those using the streets in the interest of public safety, health, welfare or convenience, but such regulations may not "abridge the constitutional liberty of one rightfully upon the streets to impart information through speech . . .").

113. Consider President Bush's use of the Willie Horton advertisement in the 1988 presidential election campaign as an example of misleading claims. Robert W. Pittman, *Voices of the New Generation; We're Talking the Wrong Language to 'TV Babies'*, N.Y. TIMES, Jan. 24, 1990, at A23 (suggesting that generations who grew up with television are highly attuned to visual images such as those projected by President Bush in his 1988 campaign); *Washington Talk: Exact Words; Second Thoughts on First Reactions To Race*, N.Y. TIMES, Apr. 26, 1989, at A24 (indicating that Bush's use of Willie Horton to exemplify his stance on crime was overpowered by racial undertones); see generally JOE MCGINNIS, *THE SELLING OF THE PRESIDENT* (1969) (addressing how campaign advertising can be manipulated so that the audience's impression of the candidate differs from reality). For a discussion of deceptive advertising, see Philip Nelson, *Comments on Advertising and Free Speech in ADVERTISING AND FREE SPEECH*, 49, 53-54 (Allen Hyman & M. Bruce Johnson eds., 1977) (characterizing deception as a two-way street requiring both a deceiving statement and someone capable of being deceived).

114. *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (citation omitted).

115. Some of these issues were raised in connection with the recent controversies surrounding the photography of Robert Mapplethorpe. See Mark Curriden, *But Is It Art?* 17 BARRISTER, Winter 1990-91, at 13, 35-36 (discussing obscenity prosecution concerning the content of certain rap music, artwork of Robert Mapplethorpe on display at the Cincinnati Art Center, sexually explicit videos and even bumper stickers); Neil A. Lewis, *What the Supreme Court Considers to Be Obscene*, N.Y. TIMES, Apr. 8, 1990, at 26 (discussing obscenity tests fashioned by the Supreme Court and likely protections they offered the

serve as guideposts to help illuminate analysis of speech questions.¹¹⁶

Serial reasoning can also be used to set sound general rules to guide principled analysis within a category of speech.¹¹⁷ The proper accommodation of speech values in concrete contexts thus can be brought into sharper focus.

Nonetheless, serial reasoning can only go so far.¹¹⁸ At some point, a plurality of principles will vie with each other for the designation "most just," necessitating a balance of the value of expression against communitarian interests.¹¹⁹ In the First Amendment context, this has generally been accomplished through weighted balancing, mainly the definitional or categorical form as described above.¹²⁰ This balancing will inevitably require the exercise of some discretion; we must rely on practical reason to yield principled outcomes.

As with moral reasoning, the practical aim in First Amendment analysis should be to reach reasonably reliable agreements as to the proper accommodation of speech values in context.¹²¹ This is typ-

Mapplethorpe exhibit). The performances and albums of Madonna and 2 Live Crew have also spurred debate about the line between art and obscenity or pornography. Stephen Holden, *That Madonna Video: Realities and Fantasies*, N.Y. TIMES, Dec. 3, 1990, at C18; Sara Rimer, *In Rap Obscenity Trial, Cultures Failed to Clash*, N.Y. TIMES, Oct. 22, 1990, at A12.

116. Further serial rules could be derived from the wealth of First Amendment case law, especially "paradigmatic judicial opinions" like *New York Times v. Sullivan*. See Farber & Frickey, *supra* note 5, at 1631-39 (discussing *New York Times Co. v. Sullivan*, 381 U.S. 254 (1964)).

117. This article takes up this task in relation to commercial speech. See *infra* text accompanying notes 307-442.

118. See, e.g., RAWLS, *supra* note 41, at 43-45 (suggesting that the usefulness of serial reasoning in developing a moral theory of justice may be limited to certain specific social circumstances, rather than generally applicable to priority problems).

119. See NIMMER, *supra* note 13, § 2.03 (suggesting that definitional balancing be used to determine the First Amendment free speech guarantee). A general rule is preferred, "at least where we can discern generally applicable rules that should balance with fair precision the competing interests at stake" *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 63 (1971) (Harlan, J., dissenting), quoted in NIMMER, *supra* note 13, § 2.03, at 2-24. See also Irving R. Kaufman, *The Message, the Medium, and the First Amendment*, in *THE MESSAGE, THE MEDIUM, AND THE FIRST AMENDMENT* 28 (1970) (concluding that "the regulation of any particular medium is constitutionally permissible only to protect some legitimate and important interest of the state . . . and only as long as the restraint . . . is no greater than necessary and is applied evenhandedly . . . "). But see EMERSON, *supra* note 14, at 17 (arguing that "the main function of the courts is not to balance the interest in freedom of expression against other social interests but to define the key elements in the First Amendment . . . ").

120. See *supra* notes 102-05 and accompanying text.

121. As Justice Harlan said:

ical of the movement toward the Middle Ground. A related, more focused objective is to provide guidance for achieving reliable accommodations in specific speech areas to aid judges and other decisionmakers who must actually resolve these cases. This article undertakes this task with respect to commercial speech.

The approach for resolving commercial speech cases may also be useful in other First Amendment areas. In particular, the Middle Ground illuminates a sound and reliable method for upholding our tradition of free speech. The Middle Ground can also measure the efforts of judges and other decisionmakers who actually resolve speech questions. A review of the relationship of commercial speech to the First Amendment will help to lay a foundation for the practical reasoning model to be applied to commercial speech.

III. COMMERCIAL SPEECH

Protection of commercial speech has been a subject of considerable controversy in free speech theory. The path from *Valentine v. Chrestensen*¹²² to *Board of Trustees v. Fox*¹²³ has been well documented.¹²⁴ Rather than reviewing the voluminous case law and commentary on commercial speech, this section focuses on one seminal Supreme Court case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹²⁵

There are several reasons for the choice. First, *Virginia Phar-*

At least where we can discern generally applicable rules that should balance with fair precision the competing interests at stake, such rules should be preferred to the plurality's [ad hoc] approach both in order to preserve a measure of order and predictability in the law that must govern the daily conduct of affairs and to avoid subjecting the press to judicial second-guessing

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 63 (1971) (Harlan, J., dissenting), *overruled by Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976).

122. *Valentine v. Chrestensen*, 316 U.S. 52 (1942), *overruled by Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980).

123. 492 U.S. 469 (1989). *Fox* is discussed *infra* text accompanying notes 348-64.

124. A sampling of the leading literature includes: BAKER, *supra* note 7, at 194-224; REDISH, *supra* note 6, at 60-68; Baker, *Commercial Speech*, *supra* note 28; Cass, *supra* note 13; Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372 (1979); Thomas H. Jackson & John C. Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Schauer, *Architecture*, *supra* note 61; Shiffrin, *supra* note 30. See also Michael Feldman, Note, *Survey of the Literature: Commercial Speech and Commercial Speakers*, 2 CARDOZO L. REV. 659 (1981) (surveying academic commentary on commercial speech between 1976-81).

125. 425 U.S. 748 (1976).

macy has a secure place within the First Amendment tradition. The Court both employed conventional First Amendment analysis in founding its rationale and, in turn, expanded the horizon of free speech.¹²⁶ Second, the case established constitutional protection for commercial speech, and thus created an entire area of law.¹²⁷ Third, the Court incorporates many values to forge its rationale, reflecting the web metaphor described here as central to the Middle Ground vision.¹²⁸ Fourth, the arguments used by the Court explicate the essential rationale for protecting commercial speech and, thus, are key to the more fundamental question of the reach of free speech theory. Fifth, the Court's treatment of commercial speech illustrates how it might treat other candidates for inclusion under the Amendment should the Court choose to expand the spectrum of reality that reflects through the First Amendment prism.¹²⁹ Sixth,

126. *Id.* at 756-61.

127. *Id.* at 761-70.

128. See *supra* text accompanying notes 65-71.

129. "[L]anguage is a means not only to describe reality, but also to discover reality." Bernhard Grossfeld, *Language and the Law*, 50 J. AIR L. & COM. 793, 799 (1985) (citing WILHELM VON HUMBOLDT, ÜBER DIE VERSCHIEDENHEIT DES MENSCHLICHEN SPRACHBAUS UND IHREN EINFLUSS AUF DIE GEISTIGE ENTWICKLUNG DES MENSCHENGESCHLECHTS [ON THE DIFFERENCES OF HUMAN LANGUAGES AND THEIR INFLUENCE ON THE INTELLECTUAL DEVELOPMENT OF THE HUMAN RACE] (1836)).

Since the Court's proclamation of "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), most such classes have been accorded some degree of constitutional protection, illustrating the remarkable expansion in the reach of the First Amendment. For reevaluation of "the lewd and obscene," *id.* at 572, compare *Roth v. United States*, 354 U.S. 476, 484 (1957) (holding obscenity unprotected and specifying the test to be whether or not the material is "utterly without redeeming social importance") with *Miller v. California*, 413 U.S. 15, 24 (1973) (rejecting the *Roth* standard and imposing a narrower, three-part test). For reconsideration of "the profane," *Chaplinsky*, 315 U.S. at 572, compare *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975) (holding ordinance prohibiting outdoor exhibition of films containing nudity overinclusive) and *Cohen v. California*, 403 U.S. 15, 26 (1971) (reversing disturbing the peace conviction based on defendant's wearing a jacket emblazoned with the words "Fuck the Draft" because doing so was "speech" rather than "offensive conduct") with *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-50 (1978) (holding FCC regulation of otherwise protected speech justified by the nature of the broadcast medium). For an illustration of change with respect to "the libelous," *Chaplinsky*, 315 U.S. at 572, see *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1963) (holding statements "otherwise . . . constitutionally protected [against allegations of libel] do not forfeit that protection because they were published in the form of a paid advertisement"). For examples of reevaluation regarding "insulting or 'fighting' words," *Chaplinsky*, 315 U.S. at 572, see *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (*per curiam*) (holding statement not directed toward a particular person or group not "fighting words"); *Gooding v. Wilson*, 405 U.S. 518, 528 (1972) (striking abusive language statute as overbroad because applicable to more than "fighting words").

the opinion recognizes that state interests may also be important in relation to free speech, thus requiring, in some circumstances, an accommodation of competing values. Seventh, the Court proceeds from this recognition to strike a balance between free speech and state interests in a principled manner wholly consistent with the meaning and tradition of the First Amendment. As a result, the opinion suggests a sound general approach to free speech analysis. Eighth, Justice Blackmun exercises his "situation sense"¹³⁰ to accomplish these goals, showing us all how to remain faithful to the First Amendment tradition.

In short, *Virginia Pharmacy* offers a good paradigm through which to explore the inner tensions, dynamics and ultimate reach of free speech theory that the Middle Ground captures. The case is also useful to illustrate the general accommodation of speech values to be made in concrete contexts, such as the commercial area.

A. Why Commercial Speech Merits First Amendment Protection

Justice Blackmun begins his opinion for the *Virginia Pharmacy* majority by noting that prior decisions of the Court had given "some indication that commercial speech is unprotected."¹³¹ To establish protection for commercial speech, Blackmun must confront this legacy of seemingly contrary opinion. He proceeds with this task by "clarifying" the existing body of law, asserting that "[s]ince the decision in *Breard*,¹³² . . . the Court has never de-

Current candidates for protection under the First Amendment include: a range of professional confidential communications, see Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 614 (1990); hate speech of some form, see *R.A.V. v. St. Paul*, No. 90-7675, 1992 U.S. LEXIS 3863 (June 22, 1992) (invalidating ordinance banning hate speech) and compare *BOLLINGER*, *supra* note 23, (arguing for tolerance of extremist speech as the anvil on which basic conceptions of First Amendment protections are hammered out) with Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2356-57 (1989) (suggesting that racist hate speech need not be afforded First Amendment protection) and Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 612-13 (1990) (arguing that *Falwell* shows the Court extends First Amendment protection to hate speech); and a range of business, corporate and securities speech that arguably fits within an expanded commercial speech category, see *infra* note 141-42 and accompanying text.

130. See *supra* note 59.

131. *Virginia Pharmacy*, 425 U.S. at 758.

132. *Breard v. Alexander*, 341 U.S. 622 (1951). In *Breard*, the Court upheld a prohibition on door-to-door solicitation of magazine subscriptions. It emphasized that the "selling . . . brings into the transaction a commercial feature" not present in door-to-door

nied protection on the ground that the speech in issue was 'commercial speech.'"¹³³ He paints the Court's earlier view as "[t]hat simplistic approach, which by then had come under criticism or was regarded as of doubtful validity by [some] Members of the Court"¹³⁴

The Court's opinion in *Bigelow v. Virginia*,¹³⁵ issued in the immediately preceding Term, foreshadowed the metamorphosis of commercial speech to occur in *Virginia Pharmacy*. Blackmun noted that, with the *Bigelow* decision, "the notion of unprotected 'commercial speech' all but passed from the scene."¹³⁶ The *Bigelow* Court recognized that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."¹³⁷ However, according to the *Virginia Pharmacy* majority, *Bigelow* left open the question of First Amendment protection for commercial speech because the advertisement at issue there was not purely commercial.¹³⁸ Thus, *Virginia Pharmacy* placed the status of commercial speech "squarely before [the Court]."¹³⁹

The type of commercial speech at issue in *Virginia Pharmacy* was standard commercial advertising, pure and simple.¹⁴⁰ Today,

distribution of leaflets concerning core speech, like religion, condoned in *Martin v. Struthers*, 319 U.S. 141 (1943). *Breard*, 341 U.S. at 642.

133. *Virginia Pharmacy*, 425 U.S. at 759.

134. *Id.* (footnote omitted).

135. 421 U.S. 809 (1975). In *Bigelow*, the Court reversed the conviction of an individual who placed an advertisement about the availability of legal abortions in New York in a Virginia newspaper in violation of Virginia's then-existing abortion law.

136. *Virginia Pharmacy*, 425 U.S. at 759. The Court sidestepped the issue on an earlier occasion. See *Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (characterizing employment advertisements as "classic examples of commercial speech," but upholding an ordinance prohibiting gender-designated columns for the notices because the discriminatory hiring proposed was illegal).

137. *Bigelow*, 421 U.S. at 825-26.

138. *Virginia Pharmacy*, 425 U.S. at 760.

139. *Id.* at 761.

140. *Id.* at 761.

Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.

Id.

of course, the range of communication to which the category "commercial speech" could be applied seems much more expansive than merely speech which proposes a commercial transaction.¹⁴¹ Any comprehensive treatment of such an expanded category of commercial speech need concern a wide range of business, corporate and securities speech in addition to standard commercial advertising, promotion and solicitation.¹⁴² In fact, the limit of the commercial speech category remains one of the open issues in First Amendment jurisprudence. It may be preferable to allow the doctrine to develop further through the common law, building from the ground up.

The *Virginia Pharmacy* Court's commercial speech rationale is noteworthy in that it relies on a web of diverse, interlocking values. Each of these values is worth exploring in order to capture the dynamic of free speech theory.

141. See *Board of Trustees v. Fox*, 492 U.S. 469 (1989) (involving First Amendment challenge of a rule promulgated by the State University of New York prohibiting, *inter alia*, "Tupperware Parties" in dormitory rooms). Proposal of a commercial transaction "is the test for identifying commercial speech." *Fox*, 492 U.S. at 473-74. The Court has displayed occasional looseness with respect to its definition. The Court's initial definition was "speech which does 'no more than propose a commercial transaction.'" *Virginia Board of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). In *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 561-62 (1980), however, the Court lent some confusion to the definition by referring to commercial speech as both "expression related solely to the economic interests of the speaker and its audience" and "speech proposing a commercial transaction." *Id.* at 561, 562. (The *Central Hudson* Court invalidated a regulation barring advertisement of the electric company's services. *Id.* at 572.) Since *Central Hudson*, the Court seems to have settled on the latter definition, without the "does no more than" language of *Bigelow*, 421 U.S. at 820.

Several commentators have advocated revised definitions of commercial speech. See, e.g., David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 401 (1990) (suggesting commercial speech be defined as "speech that does no more than propose the sale of a specific, named good or service"); Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 236 (1976) (proposing as the definition "(1) speech that refers to a specific brand name product or service, (2) made by a speaker with a financial interest in the sale of the advertised product . . . [and] (3) that does not advertise an activity itself protected by the first amendment").

142. The Court first referred to these types of "communications [as ones] regulated without offending the First Amendment . . . [because the] commercial activity [was] deemed harmful to the public." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). An expanded category of commercial speech has been perceptively discussed by Professors Schauer and Shiffrin. See Schauer, *Architecture*, *supra* note 61, at 1183-85; Shiffrin, *supra* note 30, at 1213-14.

1. Profit motive

The first settled proposition in First Amendment theory invoked to support commercial speech is "that speech does not lose its First Amendment protection because money is spent to project it"¹⁴³ Profit motive is not a principled basis on which to distinguish commercial from non-commercial speech because there are obvious similarities between commercial and other speech promoted at a cost to the speaker.¹⁴⁴ Still, profit motive is troublesome for First Amendment theory, especially when not linked to more central free speech values.¹⁴⁵ The marketplace of ideas has not traditionally been thought to depend on the marketplace for goods and services.¹⁴⁶

2. Content regulation

The Court next moves to content regulation and the axiomatic First Amendment principle that expression may not be regulated by content.¹⁴⁷ Focusing on the content of commercial expression,

143. *Virginia Pharmacy*, 425 U.S. at 761.

144. See, e.g., Baker, *Commercial Speech*, *supra* note 28, at 9 (exploring the differences and similarities between profit-oriented and self-interested speech); Farber, *supra* note 124, at 381-83 (citing newspapers, paid public speakers, political candidates and professional authors as examples of those who should be afforded constitutional protection, despite the profit motive underlying the speech); Redish, *supra* note 124, at 430 ("Speech aimed at improving the speaker's economic position by private means, however, is not automatically severed from the stronger safeguards of the first amendment, as illustrated by the numerous supreme court [sic] decisions bringing certain labor unions under the rubric of the first amendment.").

145. See *Breard v. Alexandria*, 341 U.S. 622 (1950) (ordinance forbidding door-to-door sale of goods not a violation of free speech), *overruled by* *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980); see also BAKER, *supra* note 7, at 198 ("the profit-motivated speech of the marketplace of commodities . . . does not seem to deserve the same status as the speech of the marketplace of the mind . . . [and] justifies] excluding this commercial speech from constitutional protection," for the reasons Baker describes in his book).

146. See *infra* notes 211-52 and accompanying text (Part III(D)).

147. Indeed, "[e]liminating economic motive as a disqualifying factor seems to leave no basis for excluding commercial speech, as a class, from First Amendment protection." Farber, *supra* note 124, at 383. Farber suggests that certain types of commercial speech might be excluded if they do not contain "some minimum level of 'redeeming social value.'" *Id.* (citing *Miller v. California*, 413 U.S. 15, 21-25 (1973)). See also Baker, *Commercial Speech*, *supra* note 28, at 45 (discussing the failure of the Court to distinguish between commercial speech and other forms of speech in both *Bigelow* and *Virginia Pharmacy*); Redish, *Free Speech*, *supra* note 25, at 613 (rejecting approach of exclusion by content); see generally Martin H. Redish, *The Content Distinction in First Amendment*

i.e., commerce, the Court asserts that "if . . . commercial speech . . . lacks all First Amendment protection, . . . it must be distinguished by its content."¹⁴⁸ However, "the speech whose content deprives it of protection cannot simply be speech on a commercial subject" because commercial subjects have never been thought outside the ambit of First Amendment protection.¹⁴⁹ The Court then states:

No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection.¹⁵⁰

3. Advancement of Knowledge and Pursuit of Truth

Advancement of knowledge and pursuit of truth are invoked to support commercial speech in the succeeding part of the Court's opinion. "Our question is whether speech which does 'no more than propose a commercial transaction,' . . . is so removed from any 'exposition of ideas,' . . . and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection."¹⁵¹ This question is perhaps the central one of the case. The Court examines whether ideas and information on commercial subjects are unlike speech on other subjects protected by the First Amendment. Given that our knowledge of the world comes from ideas and information we collect and share, the answer to this query has to be, as the Court concludes, "that it is not."¹⁵²

Analysis, 34 STAN. L. REV. 113, 142-43 (1981) (arguing that a distinction between "content based" and "content neutral" legislation is unnecessary when balancing state interest and available alternative means of expression).

148. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

149. *Id.*

150. *Id.* at 761-62 (citing *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) and *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

151. *Id.* at 762 (citations omitted).

152. *Id.* It is certainly naive to assume that the truth will always prevail through the "power of the thought to get itself accepted in the competition of the market . . ." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting). However, the

4. Speaker Interests: Economic

From its discussion of commercial speech in the abstract, the Court shifts direction, "[f]ocusing first on the individual parties to the transaction that is proposed in the commercial advertisement"¹⁵³ Here, the Court invokes traditional speaker and listener interests underlying free speech theory. Turning first to the speaker's interests, the Court "assume[s] that the advertiser's interest is a purely economic one"¹⁵⁴ and concludes that a primarily economic interest "hardly disqualifies [the pharmacist] from protection under the First Amendment."¹⁵⁵ The value of art, not mentioned by the Court, might be added to the speaker interests in advertising. Professor Redish has argued convincingly that advertising may have artistic value.¹⁵⁶ Commercial art does not, of course, make commercial speech core expression. However, art does play an important role in free speech theory with respect to both self-realization of artistic talent by the speaker and the inspiration listeners derive therefrom.

5. Listener Interests: Self-realization

Turning to the other individual party to the commercial transaction — the listener — Justice Blackmun unfolds some of the core arguments supporting constitutional protection for commercial speech. The "[c]onsumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far than his

marketplace model still has an important role to play in free speech theory for protecting the free flow of information and recognizing the fallibility of government in regulating speech. Redish, *Free Speech*, *supra* note 25, at 616-19 (though potentially dangerous, the truth test should not be discarded); Shiffrin, *supra* note 30, *passim*.

153. *Virginia Pharmacy*, 425 U.S. at 762.

154. *Id.*

155. *Id.*

156. REDISH, *supra* note 6, at 446-47 (noting, among other examples, art nouveau posters). Modern advertising has given society trendy ideas and catchy slogans like "Where's the beef?," which took on political implications in the 1984 presidential campaign, see Bernard Weintraub, *Mondale Goads Reagan To Submit Economic Plans*, N.Y. TIMES, Sept. 21, 1984, at B12, appealing logos and trademarks like the Campbell's soup can Andy Warhol raised to an art form, and tunes like "I'd like the teach the world to sing/In perfect harmony" Joseph P. Kahn, *The Super Sell: Stakes High for Advertisers*, BOSTON GLOBE, Jan. 25, 1990, at 73. See also Cass, *supra* note 13, at 1367 (considering the potential social and political value of some well-known, brand-specific advertisements).

interest in the day's most urgent political debate."¹⁵⁷ This statement, perhaps the most famous in the case, conjures up several central First Amendment arguments.

Even though prosaic, commercial speech is nonetheless important because it involves the dissemination of information concerning products and services in our vast market economy where information is among the most valuable of resources.¹⁵⁸ The free flow of information increases our knowledge of the world, thereby aiding us to purchase the goods and services we need to function in society. In other words, commercial speech facilitates self-realization, a core value of the First Amendment.¹⁵⁹ Justice Blackmun's opinion implicitly recognizes this core value of free speech. Possession of commercial information allows "self-realization" because, among other functions, it enables us to assert some measure of control over our lives, aiding in the decisionmaking process through which we may fulfill our aspirations.¹⁶⁰

Moreover, in an overwhelmingly materialistic society, Blackmun seems quite right in asserting that commercial information may be more important than the "day's most urgent political debate."¹⁶¹ While Americans may not participate in the political process in great numbers, they do participate in the commercial process every day through innumerable market transactions.¹⁶²

157. *Virginia Pharmacy*, 425 U.S. at 763.

158. See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981) (assessing the effect of management's superior access to information relating to tender offers, as compared to shareholders, and the benefits that information provides).

159. See *supra* notes 24-25 and accompanying text.

160. The Supreme Court of Canada, a comparable modern society, also recognizes the value of commercial speech vis-a-vis self-realization. See *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, 716-17:

Commercial expression, like political expression, is one of the forms of expression that is deserving of constitutional protection because it serves individual and societal values in a free and democratic society. Indeed, over and above its intrinsic value as expression . . . commercial expression plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy.

161. *Virginia Pharmacy*, 425 U.S. at 763.

162. BAKER, *supra* note 7, at 194. See also REDISH, *supra* note 6, at 26-30 (questioning the average individual's interest and ability to become involved in political affairs from the perspective of elitist theory); Redish, *Free Speech*, *supra* note 25, at 608-10 (arguing that inherent value of free speech in a democratic system relates to individual decisionmaking rather than political control).

Certainly, commercial speech addresses the problems of everyday life. Consumption and purchasing are major sources of recreation and satisfaction. Many people devote more attention and care to private economic decisions than they do to political issues. Private economic decisions may be both more personally controllable and more relevant to a person's life, to self-expression and self-realization, than are most political issues. Advertising often provides information and arguments relevant to these decisions and, thus, is relevant for 'achieving a materially satisfactory life.' Practice in assimilating commercial speech also could help develop people's rational decision-making capabilities. In all these ways, commercial speech, probably to a greater extent than political speech, makes individual self-government more effective.

This state of affairs constitutes an illustration of the rift between Grand Theory and practice.¹⁶³ Perhaps self-realization through commerce can lead to enhanced self-realization generally.

6. Informational Value

Commercial speech disseminates valuable data to the public, allowing speakers and listeners to economize their time and effort in deciding how to allocate resources.¹⁶⁴ Both listeners and speakers benefit by this exchange of information; neither profits when commercial speech is suppressed. Blackmun invokes this efficiency principle in his *Virginia Pharmacy* opinion and combines it with a social twist. Tangible social and economic effects follow from suppression of commercial speech. Stopping the flow of information hurts everyone, but it disproportionately affects "the poor, the sick, and particularly the aged."¹⁶⁵ These weakest members of society spend a "disproportionate amount of their income . . . on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent."¹⁶⁶ Accordingly, this information is

163. See *supra* note 31nd accompanying text.

164. The informational value of commercial speech was recognized early. See Farber, *supra* note 124, at 387 (advertising has an informative function); Redish, *supra* note 124, at 432-33, 447 (discussing the informational value of advertising).

165. *Virginia Pharmacy*, 425 U.S. at 763.

166. *Id.*

"more than a convenience."¹⁶⁷ For the poor, sick and aged, "[i]t could mean the alleviation of physical pain or the enjoyment of basic necessities."¹⁶⁸

Rarely has the value of free speech been put so graphically. Rarely also has the link between the economic marketplace and the marketplace of ideas been made so explicit.

7. Society and Public Interest

Viewing the bigger picture, the Court discusses "society[']s . . . strong interest in the free flow of commercial information."¹⁶⁹ Commercial speech may involve matters of public interest too. Examples are not hard to conceive.

The facts of decided cases furnish [ample] illustrations: advertisements stating that referral services for legal abortions are available . . . ; that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals . . . ; and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs¹⁷⁰

167. *Id.*

168. *Id.* at 764. Indeed, the role of advertising in lowering search costs and making products affordable is well documented. *See, e.g.,* Terry Calvani et al., *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761, 781 (1988) (concluding that advertising legal services lowers costs without lowering quality, enhances competition and reduces consumer search time without increasing costs); Ronald H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 2, 14 (1977); Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed To Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983) (concluding that lawyer advertising will lead to more affordable legal services for low- and middle-income consumers and that attorneys providing these services will also benefit); George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961) (examining the effects of various types of advertising on consumer behavior).

169. *Virginia Pharmacy*, 425 U.S. at 764.

170. *Id.* (citations omitted).

Professor Shiffrin argues that while "commercial advertising sometimes has political significance," it rarely contributes to political dialogue. Accordingly, "sorting out such advertisements on a case-by-case basis presents risks of arbitrary decisionmaking and uncertainty." Shiffrin, *supra* note 30, at 1227. On this basis alone, it would seem preferable to protect commercial speech under the Amendment in order to guard against the possibility of arbitrary decisionmaking, resulting in the exclusion of other valuable speech. *See, e.g.,* Board of Trustees v. Fox, 492 U.S. 469, 474 (1989) (recognizing that where commercial speech is inextricably intertwined with otherwise fully protected speech, the level of First Amendment scrutiny must depend on the nature of the speech taken as a whole).

Less weighty public interests might also be involved. Indeed, according to the *Virginia Pharmacy* opinion,

[t]here are few [commercial messages] to which such a [public interest] element . . . could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not.¹⁷¹

This public interest function is a central justification for protection of commercial speech as bordering on core speech. It implicates foundational values like truth, self-government, self-realization and autonomy. There is little need to press this argument, however, as it leads into the crescendo of the last two central justifications for First Amendment protection of commercial speech, private and public decisionmaking.

8. Private Decisionmaking

Having established that important economic, content, knowledge, truth, speaker, listener, informational, social and public interest values inhere in commercial speech, Blackmun has, in a sense, already positioned commercial speech firmly within the First Amendment tradition. Yet, as he notes, "there is another consideration that suggests no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn."¹⁷² Commercial and political information often merge together as individuals exposed to them form ideas, particularly in America where the market economy is viewed with mystical reverence.¹⁷³ Blackmun goes further, lending some grandeur to free speech theory and the place of commercial speech in the First Amendment tradition:

See also *infra* notes 348-64 and accompanying text.

171. *Virginia Pharmacy*, 425 U.S. at 764-65. Of course, "not all commercial messages contain the same or even a very great public interest element." *Id.* at 764.

172. *Id.* at 765.

173. "Increasingly in this country, the distinctions between governmental and private sectors are blurred." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163 (1967) (Warren, C.J., concurring) (discussing the relationship between First Amendment values and the separate standards applied in libel actions where plaintiffs are classified as "public figures" and "public officials").

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.¹⁷⁴

9. Public Decisionmaking

The Court's leap from private decisionmaking to public decisionmaking is not great:

[I]f [the free flow of commercial information] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.¹⁷⁵

Private decisionmaking facilitates self-realization. Once individual autonomy is achieved, participation in public decisionmaking and democratic self-government are better assured.¹⁷⁶ In turn, self-government promotes autonomy, liberty, equality, and dignity, values important to a liberal democratic society. *Virginia Pharmacy* illustrates how a firm grasp of free speech can promote these val-

174. *Virginia Pharmacy*, 425 U.S. at 765. Professor Redish first made the argument that commercial speech facilitates private decisionmaking in his seminal article. Redish, *supra* note 124 at 441-44. As Professor Redish explained, "[w]hen the individual is presented with rational grounds for preferring one product or brand over another, he is encouraged to consider the competing information . . . and in so doing exercise his abilities to reason and think; this aids him towards the intangible goal of rational self-fulfillment." *Id.* at 443-44. See also REDISH, *supra* note 6, at 57.

175. *Virginia Pharmacy*, 425 U.S. at 765 (footnotes omitted). Many commentators have made this point for some time, most prominently REDISH, *supra* note 6, at 19-26.

176. Baker, *supra* note 27, at 658-59 (arguing that democratic values of self-rule and self-government justify free speech as a means of fostering informed decisionmaking).

ues, protecting all available information needed to cope with the exigencies of our time.

One might also view this process of private and public decisionmaking as providing a mechanism for facilitating the core Emersonian value of maintaining a balance between stability and change in society.¹⁷⁷ Active citizen participation in all spheres of society serves this value, helping to modulate society. Additionally, the process seems to further Professor Blasi's "checking" value of individuals or groups forming spheres of influence ("self-governments") to counter state influence, thus creating an even more refined system of checks and balances.¹⁷⁸

10. Conclusion: The Web Metaphor

From the standpoint of free speech theory, *Virginia Pharmacy* is striking because the Court forged a rationale for commercial speech on a broad set of interlinking values, not a core of foundational ones. The Court employed a web of interdependent values that support one another and ultimately support commercial speech. Truth, self-realization and autonomy support private and public decisionmaking which, in turn, support and are supported by democracy, self-government, dignity, equality and liberty. This web of values establishes a certain structure, coherence and consistency to free speech theory. It also provides the Amendment with a measure of strength in relation to social interests.

While the values articulated by the Court are central justifications for commercial speech, the web can also be expanded to even loftier heights in the realm of free speech theory. All of these values serve to support, and are supported by, the core free speech value identified by Professor Perry as "epistemic." The epistemic value incorporates Emerson's core truth and self-fulfillment values. Combining the two ingredients, the epistemic value lends transcendence, facilitating "human beings . . . need for, and their capacity to pursue and achieve, an ever better understanding of reality."¹⁷⁹ As humans we are artificers with the essential ability

177. See *supra* notes 18-19 and accompanying text.

178. See generally Blasi, *supra* note 23 (arguing that the First Amendment should be interpreted so as to preserve rights when governments are most likely to restrict them); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (arguing that the First Amendment should serve to check governmental abuses of power and outlining historical instances of such).

179. Perry, *supra* note 54, at 1155.

"to create an ever more satisfying vision of reality."¹⁸⁰ "Freedom of expression facilitates the enterprise in question — whether the enterprise is that of understanding reality or constructing a vision of reality — thereby liberating rather than repressing an essential human capacity,"¹⁸¹ namely, that of self-realization.

Viewed in this way, commercial speech is important and merits constitutional protection because it furthers our understanding of reality and helps us to construct a more complete vision of life. Accordingly, in the realm of First Amendment theory there is no meaningful distinction between private and public or individual and political decisionmaking, or between individual and political vision. Vision may instead be described more broadly, and essentially, as the motivating sense in which we view and structure our lives.¹⁸²

B. Testing the Web: Free Speech versus The State Interest of Professionalism

A web of values providing broad support for the First Amendment is important because society is predisposed to force accommodation of free speech in concrete circumstances. Social concerns can represent competing values not otherwise included within the ambit of the Amendment. Because free speech is crucially important, because it has intrinsic worth as a key way by which we develop our faculties and achieve control over our lives, any regulation of free speech demands a heavy burden of justification. Anything less would jeopardize the strength of the constitutional guarantee.

Virginia Pharmacy tests these principles. "Arrayed against these substantial individual and societal interests are a number of justifications for the advertising ban Indisputably, the State has a strong interest in maintaining . . . professionalism" on the part of licensed pharmacists.¹⁸³ Nevertheless, the Court found that the state dealt adequately with its concern about professionalism "by the close regulation to which pharmacists in Virginia are sub-

180. *Id.*

181. *Id.*

182. *See id.* at 1160-61.

183. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766 (1976). The Court discusses the skills and expertise required of pharmacists. *Id.* at 766-68. The Court reaffirmed its opinion about the significance of professionalism in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978), when it considered advertising by lawyers.

ject.”¹⁸⁴ In other words, the Court determined that the state could rely on alternative means of encouraging professionalism without restricting speech. Moreover, the Court deferred to the preferred position of free speech in our value structure, examining the state’s case for the advertising ban closely even though “justifications of this type [has been regarded as] sufficient to sustain the advertising bans challenged on due process and equal protection grounds in [earlier cases].”¹⁸⁵ That the pharmacists’ challenge was based on the First Amendment “cast[] the Board’s justifications in a different light”¹⁸⁶

Assessing the state interest in professionalism in relation to the preferred position of free speech, the Court invokes some of the values used to construct its web of support for commercial speech. Viewed from the light of First Amendment theory, therefore, “it is seen that the State’s protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance.”¹⁸⁷ Public ignorance is obviously inconsistent with core speech values, like advancement of knowledge, truth, the marketplace of ideas, self-realization, liberty, dignity, autonomy and democracy.

The First Amendment alternative to the state’s “highly paternalistic approach” to advertising regulation is

to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the ‘professional’ pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly’s. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.¹⁸⁸

Here, Blackmun imparts a valuable lesson on the meaning and

184. *Virginia Pharmacy*, 425 U.S. at 768.

185. *Id.* at 769 (citations omitted).

186. *Id.*

187. *Id.*

188. *Id.* at 770.

tradition of the First Amendment. If the First Amendment means anything, it teaches that more is to be feared from suppression of speech than from the uses to which speech freely available may be put. The test of truth, in other words, is to be fought out in the marketplace of ideas, not in the Virginia General Assembly.

From a broader perspective, in a liberal democratic society there is a certain faith in humanity — that we can determine for ourselves the uses to which information freely available may best be put. This faith in humanity is embodied in many core speech values, like autonomy, dignity, self-realization and truth, that the Court invokes to express its preference for free speech. After all, as the Court said on another occasion: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."¹⁸⁹ Given this tradition and meaning, the First Amendment "makes [the choice] for us" to prefer more rather than less information.¹⁹⁰

Faced with the need to strike an accommodation between free speech and a strong state interest, the Court invokes traditional First Amendment methodology, balancing the competing interests with one thumb firmly on the scale in favor of free speech.¹⁹¹ The Court's solution is a model lesson in the First Amendment. In more general terms, the rule of the case is that the Amendment trumps all concerns other than very strong state interests. Here, Virginia failed to demonstrate that its interest in professionalism possesses that requisite degree of strength.¹⁹²

The Court's firm rooting of commercial speech within the First Amendment also dampens the force of critics' arguments against protection of commercial speech, forcing them to take issue with many of the core values invoked by the Court in *Virginia Pharmacy*. For example, critics arguing for a political speech model¹⁹³ of

189. *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

190. *Virginia Pharmacy*, 425 U.S. at 770.

191. The Court employs a form of definitional balancing. See *supra* notes 74, 102-10 and accompanying text.

192. From the standpoint of contemporary law, professionalism alone is not an interest weighty enough to pose a serious challenge to free speech. A more concrete demonstration of harm must be shown, such as misrepresentation, overreaching or coercion. See *infra* notes 285-302 and accompanying text.

193. See *supra* notes 16-17, 20-22 and accompanying text.

the Amendment need to address the Court's finding that in our contemporary world "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn."¹⁹⁴ Given our "predominantly free enterprise economy," democratic theory of government and free speech tradition, no meaningful distinction could ever be drawn between private and public decisionmaking in free speech theory.¹⁹⁵ Here again, "the best means . . . is to open the channels of communication rather than to close them," another choice "the First Amendment makes for us."¹⁹⁶

Other critics who are concerned about the negative influence of commercial advertising are forced to advocate closing rather than opening the channels of communication.¹⁹⁷ This negative influence argument represents the "highly paternalistic approach" of state suppression of information the Court thought to be harmful.¹⁹⁸ Needless to say, that argument is a dubious one, obviously at odds with the First Amendment.

C. The Equal Value Principle

Virginia Pharmacy establishes that commercial speech merits First Amendment protection. However, the question of where commercial speech fits within free speech theory remains unanswered. Many have argued that all forms of expression are alike in importance. Certainly, this equal value principle is fundamental to First Amendment theory.¹⁹⁹

However, reality is complicated and multi-faceted, and this complexity filters through the First Amendment prism. In practice, the Court has already breached the equal value principle to a large extent.²⁰⁰ Pornography, libel, fighting words, labor and commercial speech are the primary examples of expression which are

194. *Virginia Pharmacy*, 425 U.S. at 765.

195. *Id.*

196. *Id.* at 770.

197. See *supra* notes 26-28 & 30 and accompanying text.

198. See *supra* text accompanying notes 188-90.

199. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948)) (footnote omitted); accord REDISH, *supra* note 6, at 13; Shiffrin, *supra* note 30, at 1277-78.

200. Shiffrin, *supra* note 30, at 1277 (citing as an example the Court's treatment of obscenity regulation).

viewed as possessing lesser value than core expression.

Two fundamental, but controversial reasons exist for this dichotomy. One is the intrinsic value of speech. Political or artistic speech is simply more valuable than, for example, pornography or commercial speech.²⁰¹ The other reason is that the communitarian interests underlying second order expression tend to be stronger than the interests in core expression. For example, regulation of pornography seems more justifiable than regulation of artistic expression because pornography appears to pose serious harm by encouraging destructive and demeaning human behavior toward others.²⁰² Assuming this to be the case, a greater degree of regulation is tolerated to protect important human and communitarian values, such as safeguarding the dignity of persons against degradation and violation and the perception and perpetuation of them as sex objects. Similar arguments could be constructed with respect to other categories of second order speech.

More coherence and architectural integrity may be brought to First Amendment theory by simply recognizing that the Amendment comprises many values and supports many types of speech,

201. "[T]he Court clearly looks to the normative value of the subject matter" in determining the degree of protection under the First Amendment. *Id.* (arguing that this value inquiry extends beyond those examples of speech deemed to be outside the scope of First Amendment protection). *Cf.* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980) ("[C]ommercial expression, . . . although meriting some protection, is of less constitutional moment than other forms of speech.").

202. *See, e.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (holding that states have a legitimate interest in regulating obscenity because of their concern with "safeguarding against crime and the other arguably ill effects of obscenity"); CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 91 & Part III (1987) (compiling the author's speeches regarding pornography and its degradation and disempowerment of women); REDISH, *supra* note 6, at 71; Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 52-54 (1985) (discussing research showing the harmful effects of pornography on women); Shiffrin, *supra* note 13, at 104; Jon Nordheimer, "Bundy Is Put to Death in Florida After Admitting Trail of Killings," N.Y. TIMES, January 25, 1989, § A, at 1 (serial killer Bundy describing effect of pornography on his life of crime).

However, as Professor Redish says, "regulation of speech may be justified [only] on a showing of harm to competing social interests." REDISH, *supra* note 6, at 71. Certainly an "arguable correlation" or "no conclusive proof of a connection" is a wholly insufficient showing of harm. *Paris Adult Theatre*, 413 U.S. at 58, 60.

[T]o prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms, . . . we must scrutinize with care the state interest that is asserted to justify the suppression. For in the absence of some very substantial interest in suppressing such speech, we can hardly condone the ill effects that seem to flow inevitably from the effort.

Id. at 103. (citations omitted) (Brennan, J., dissenting).

not all of which are of equal magnitude. The Amendment contains its own difficult inner tensions; recognizing these tensions provides a clearer view of the proper accommodation of values in speech questions.

Even though a more comprehensive view of the Amendment perceives free speech in terms of diverse and multi-ordered values, it does not follow that the equal value principle should be breached easily. To as great an extent as possible, the equal value principle should be kept intact.²⁰³ Core values and areas of speech thereby supported need vigorous support and protection, which the equal value principle helps ensure.

But if and when the equal value principle is breached, it should be done openly, with significant justification and only in the face of reasonably reliable objective determinants that can distinguish lesser speech from core speech and thereby guard against the danger of doctrinal dilution.²⁰⁴ It should also be done only when the category of speech thereby created "is capable of principled definition and application."²⁰⁵ Considering these factors, courts should confront the difficult compromises being made in the First Amendment realm.²⁰⁶

Facing and resolving these compromises among competing values is a healthy enterprise. First, it means that a broader reach of reality is receiving constitutional protection, as in the case of

203. Professor Schauer expresses the rationale for presumptions against subcategorization.

In the first amendment, as in all of law, the task of the judge is to classify the particular facts of the case within the appropriate category. Increasing the number of categories may involve an increased risk of misclassification, even if the categories are theoretically sound. When the error of misclassification is likely to occur in derogation of constitutionally preferred values, categorization in the sense of creating additional subcategories is a technique to be employed with only the greatest of caution.

. . . . We can accomplish this best by creating a presumption, albeit rebuttable, against the creation of subcategories within the first amendment.

Schauer, *Categories*, *supra* note 61, at 295-96 (citations omitted). Professor Shiffrin adds that "it is not desirable as a general matter to have judges making decisions that turn on the value of the speech." Shiffrin, *supra* note 30, at 1278. When such decisions are left to the judiciary, it should not be done "without regret." *Id.*

204. Schauer, *Categories*, *supra* note 61, at 290-96; Shiffrin, *supra* note 30, at 1278.

205. Schauer, *Categories*, *supra* note 61, at 296.

206. Shiffrin, *supra* note 30, at 1282. The Court has been facing up to these compromises to some extent. The main examples are commercial speech, defamation, and pornography. These are really small compromises, consistent with the force of the equal value principle.

commercial speech.²⁰⁷ This adds to our knowledge and vision, thereby promoting a number of important First Amendment values. However, taking in a broader reach of reality tends also to bring in underlying tensions between the value of free speech and social interests. Second, state interests asserted in limitation of lesser speech may be stronger and, accordingly, merit greater deference. Third, in a broad sense this means that groupings of free speech values and the permissible scope of their regulation are being more clearly delineated, thereby providing further content, clarity and coherence to First Amendment theory. This promotes, in turn, a more comprehensive view of the Amendment, and a clearer perception of its interaction with social reality. Fourth, it means fundamental free speech values and the core areas of speech they support are coming into sharper focus, thereby demarcating them more distinctly from lesser values and lesser types of speech. This in turn offers a more solid base of support for core values and core speech, thus reducing the likelihood of a "dilution . . . by a leveling process, of the force of the Amendment's guarantee."²⁰⁸ In this way the equal value principle can actually protect in the areas where it most matters — core speech.²⁰⁹ Nevertheless, doctrinal dilution is a serious threat to expression and must be guarded against vigilantly.²¹⁰

With respect to commercial speech then, it is necessary to examine the justification for breaching the equal value principle. This task illuminates additional inner tensions and dynamics of free speech theory. Finally, it sharpens the focus of this article by articulating the proper accommodation of free speech values to be made in concrete commercial contexts.

D. Justification for Secondary Status

There are several central justifications for breaching the equal value principle on behalf of commercial speech. These justifications include commercial speech's lesser intrinsic value, the speech plus conduct aspect of commercial speech, and the fact that commercial speech is not value-free and the values it promotes are not wholly

207. This approach appears in striking contrast to several foundationalist theories. See *supra* notes 30-31 and accompanying text.

208. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

209. Shiffrin, *supra* note 30, at 1282.

210. Schauer, *Architecture*, *supra* note 61, at 1197.

compatible with positive human self-realization. Each of these justifications is worth examining in order to determine more clearly the place of commercial speech within First Amendment theory.

1. Intrinsic Value

As discussed above, commercial speech is valuable.²¹¹ Nevertheless, there is widespread agreement that commercial speech is less important than core areas of speech.²¹² While "speech . . . which propose[s] a commercial transaction" is surely linked to the "marketplace of ideas," the ideas to which commercial speech are linked possess less intrinsic value than core speech.²¹³ Simply stated, commercial ideas are generally less valuable than political, scientific, religious, artistic or literary ideas.

Nevertheless, commercial speech may not be less valuable than core speech in all cases. For some, perhaps many individuals, commercial speech is more valuable to self-realization than core speech.²¹⁴ Therefore, the core values underpinning free speech — democracy, equality, liberty, autonomy and tolerance — mandate that those wishing to express commercial speech be freely allowed to do so, even if such expression is thought by only a minority to be crucial to the right of expression. At a minimum, equality commands that all views be allowed to circulate.²¹⁵ In essence, then, the argument that commercial speech is less valuable than core speech simply means that its dissemination may be subject to greater time, place, and manner restrictions in deference to social interests,²¹⁶ and not that commercial speech can be suppressed

211. See *supra* notes 131-82 and accompanying text (Part III(A)).

212. Schauer, *Architecture*, *supra* note 61, at 1182. "[C]ommercial speech is not equivalent to political or even artistic speech; it is less important." Shiffrin, *supra* note 30, at 1220. "[M]any individuals and communities have the intuition that commercial speech is not as important or valuable as non-commercial speech." *Id.* at 1278. See also *supra* text accompanying notes 12, 200-02 (detailing the low value ascribed commercial speech by the Supreme Court). Note also that even in *Virginia Pharmacy*, the Court implicitly perceived commercial speech as less valuable. "Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." *Virginia State Bd. of Pharmacy v. Virginia Citizens consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

213. Schauer, *Architecture*, *supra* note 61, at 1182.

214. See *supra* text accompanying notes 157-63.

215. See *supra* note 199-206 and accompanying text.

216. See *supra* note 201-03 and accompanying text.

more easily or inhibited without strong cause.²¹⁷

2. Speech-plus-conduct

Subjugating commercial speech to a secondary status might arguably be justified on the ground that commercial speech involves speech-plus-conduct. Speech mixed with conduct generally receives less protection under the Amendment than pure speech.²¹⁸ Commercial speech can be construed as a form of speech-plus-conduct because of the nexus between the speech proposing a commercial transaction and the subsequent transactions in which sellers and buyers engage.²¹⁹

The proposal of the commercial transaction can be analogized to the proposal of a contract:

Similar to the language of a written contract, the language in advertising can be seen as constituting part of the seller's commitment to the buyer. Thus, advertising can function as part of the contractual arrangement between the buyer and seller. Of course, in addition to serving this contractual function, advertisements also serve an informative function to which the first amendment applies. The critical factor seems to be whether a state rule is based on the informative function or the contractual function of the language.²²⁰

Recognizing the contractual function of commercial speech is important.

First, it explains the intuitive belief that commercial speech is somehow more akin to conduct than are other forms of speech. The unique aspect of commercial speech is that it is a prelude to, and therefore becomes integrated into, a

217. See *supra* note 204-10 and accompanying text.

218. Classic examples of speech-plus-conduct cases include *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning) and *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft card). A principled distinction between speech and conduct has proved problematic for free speech theory. See *supra* note 30. Rather than using the action-expression dichotomy to determine whether the speech in question merits protection, the focus should shift to determining the degree of protection such speech should be accorded. In this way, speech-plus-conduct can be viewed as another tension to be resolved in the context of concrete cases, as this article advocates.

219. "[T]he commercial speaker not only talks about a product, but also sells it." Farber, *supra* note 124, at 386.

220. *Id.* at 387 (footnote omitted).

contract, the essence of which is the presence of a promise. Because a promise is an undertaking to ensure that a certain state of affairs takes place, promises obviously have a closer connection with conduct than with self-expression. Second, this approach focuses on the distinctive and powerful state interests implicated by the process of contract formation. In a fundamentally market economy, the government understandably is given particular deference in its enforcement of contractual expectations. Indeed, the Constitution itself gives special protection to contractual expectations in the contract clause. Finally, this approach connects a rather nebulous area of first amendment law with the commonplaces of contract law of which every lawyer has knowledge The basic doctrines of contract law . . . provide a helpful guide in considering commercial speech problems.²²¹

The contractual function also provides a basis for identifying commercial speech. An important distinguishing trait of commercial speech is its nexus between speech and the ensuing commercial transaction. By identifying commercial speech as such, its content and treatment can be demarcated from other areas of speech, especially core speech, thereby lessening the danger of doctrinal dilution.²²²

Finally, the contractual function approach brings into focus the strong state interests that underlie commercial speech. These concerns include the well-recognized contract doctrines of falsity, fraud, misrepresentation, coercion, overreaching, harassment, duress and unconscionability. As this list illustrates, government may have legitimate interests in regulating speech that do not implicate First Amendment values, thereby providing a basis for regulation apart from suppression of speech.²²³ This contractual character of commercial speech may be useful for scrutinizing the language em-

221. *Id.* at 389 (footnote omitted).

222. See *supra* notes 204-10 and accompanying text. The danger of doctrinal dilution, and other threats to speech, is especially great in pathological periods, those periods "characterized by a notable shift in attitudes regarding the tolerance of unorthodox ideas." Blasi, *supra* note 23, at 450-51. In fact, doctrinal dilution might be viewed as a manifestation of such pathology.

223. See Farber, *supra* note 124, at 389-91; cf. *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (acknowledging incidental restriction on speech in upholding conviction of draft card burning, in part, on the theory that "the governmental interest is unrelated to the suppression of free expression").

ployed in a commercial transaction and, when language is misused, for assigning an appropriate remedy.

3. Not Value Free

Another principal justification for breaching the equal value principle on behalf of commercial speech is that commercial speech is not value free. It "not only helps mold the world, it molds the world in very particular ways."²²⁴ A cognitive psychology analysis of the primary theoretical framework of consumer choice and behavior with respect to modern advertising may explain this effect. The cognitive approach views consumer response as "largely verbal problem-solving: Advertising information changes beliefs about products/services that produce changed attitudes and lead to new behavioral intentions."²²⁵

The cognitive approach appears to complement the economic view of advertising as information. The economic view emphasizes the savings in effort, time and money which advertising produces and which promotes economic efficiency and rational decisionmaking.²²⁶ Such a rationale was endorsed by the Court in *Virginia Pharmacy*.²²⁷ However, recent studies on consumer behavior indicate that nonverbal and emotional advertising are better explained through the paradigm of classical psychological conditioning. Such advertising employs techniques and stimuli that appeal to the emotional, subliminal and subconscious human personality. These studies show that consumers are not wholly conscious of the effect of such advertising on their purchase decisions.²²⁸

224. BAKER, *supra* note 7, at 203; *see also* Baker, *Commercial Speech*, *supra* note 28, at 15.

225. O. Lee Reed & Douglas Whitman, *A Constitutional and Policy-Related Evaluation of Prohibiting the Use of Certain Nonverbal Techniques in Legal Advertising*, 1988 B.Y.U. L. REV. 265, 278-79 (citations omitted). While cognitive psychology includes the study of all thinking processes, cognitive theorists have focused chiefly on verbal thinking, especially verbal memory and analysis. Thus, "advertising's effect can be studied by testing consumers for verbal recall of advertising and asking them to report their attitudes and intentions." *Id.*

226. *See id.* at 281; *see also* sources cited in *supra* note 168.

227. *See supra* notes 164-68 and accompanying text.

228. Reed & Whitman, *supra* note 225, at 278-80 and especially authorities cited at 280 n.60. "The implicit conclusion is that consumers often are not conscious of the causal relationship that prior advertising has to subsequent purchase behavior, especially advertising with emotional impact." *Id.* at 279. "The communications research manager of the nation's leading soft drink manufacturer . . . even deemed Pavlov 'the Father of Modern Advertising' in recognition of classical conditioning's importance to his work." *Id.* at 280

In this later view, the goal of nonverbal advertising is to condition the mind through emotional appeals in order to induce the purchase of advertised goods or services. This type of persuasional advertising tends to mold the world by creating the consumer demand that the commercial world satisfies.²²⁹ Advertisers manipulate consumers primarily through nonverbal, relatively noninformational techniques that employ music, graphics and dramatizations.²³⁰

If the psychological conditioning analysis of advertising is accurate, the economic theory's emphasis on information is misplaced. According to the conditioning rationale, the economic theory "is subject to serious interpretational error . . . since economists largely ignore *how* decision-makers form preferences and focus almost solely on the *result* of [presumed] rationality (e.g., [sic] increased information engenders greater demand by lowering costs)."²³¹ The economic theory of advertising is flawed because it underestimates "nonverbal, emotional advertising information on consumer preferences."²³² Economic theories may thus be unrealistic in some important respects.²³³

(citing ADVERTISING AGE, Jan. 30, 1984, at 24 (statement of Joel S. Debow)).

Many advertising pioneers recognized early the role of emotion as a selling tool. J.B. Watson, an academic psychologist turned advertising executive, *id.* at 275, once stated: "To make your consumer react, . . . it is only necessary to confront him with either fundamental or conditioned emotional stimuli." STEPHEN FOX, *THE MIRROR MAKERS* 85 (1984), cited in Reed & Whitman, *supra* note 225, at 275. "Advertising worked not so much by giving information as by arousing emotions." DAVID COHEN, J.B. WATSON: THE FOUNDER OF BEHAVIORISM 189 (1979). "This view of persuasion is widely held by advertising agency personnel: 'Advertising is not a debate. It's a seduction.'" Reed & Whitman, *supra* note 225, at 275 n.40 (quoting AL RIES & JACK TROUT, *POSITIONING: THE BATTLE FOR YOUR MIND* 60 (1981)).

229. BAKER, *supra* note 7, at 203-04; C.B. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 182 (1973) ("[T]he market system . . . creates the wants which it satisfies."), quoted in Baker, *Commercial Speech*, *supra* note 28, at 15. Professor Baker posits that advertising "stimulat[es] the most cheaply aroused desires." Baker, *Commercial Speech*, *supra* note 28, at 15. Professor Farber suggests "[i]t might be tenable to treat commercial speech like pornography and require some minimal level of 'redeeming social value' as a prerequisite for first amendment [sic] protection." Farber, *supra* note 124, at 383.

230. See Reed & Whitman, *supra* note 225, at 275-78; see also *infra* notes 434-42 and accompanying text.

231. Reed & Whitman, *supra* note 225, at 283 (citation omitted).

232. *Id.* Economic theory views deceptive advertising as a problem regulated mainly by the marketplace; deception will fool consumers only once. The resulting damage to a seller's reputation and subsequent loss of business will outweigh any profit from the deception. *Id.* at 282.

233. Arie Kapteyn & Tom Wansbeek, *Empirical Evidence on Preference Formation*, 2 J.

Perhaps economic theory could be made more useful by integrating the methods by which consumers process information to reach purchase decisions, instead of focusing solely on the results of choice. Broadening the theory's conception of information to include both verbal and nonverbal sources correspondingly broadens the range of potential deception. The "added value" of advertising might be more realistically viewed as "induced preference," a form of deception.²³⁴ The critical factor in assessing speech would then seem to be whether or not the speech performs more an informative function, implicating important First Amendment values, or a conditioning function.

There are deeper reasons for the commercial/noncommercial distinction. These go to the values being formed, encouraged and supported by the speech. The Bill of Rights was framed fundamentally to carve out a sphere of individual liberty so that citizens could better achieve dignity, autonomy and equality. The First Amendment plays a leading role in sustaining and promoting these human values.²³⁵ But these human values are threatened by the American commercial market structure.²³⁶ Commercial America tends to promote a system of values at odds with those enshrined in the Bill of Rights. These commercial values include materialism, exploitation, hedonism and superficiality. Americans are urged to define themselves in terms of what they own or produce, not by who they are or would like to become.²³⁷

ECON. PSYCHOL. 137 (1982).

234. Reed & Whitman, *supra* note 225, at 285-86. Human behavior is obviously complicated, only elements of which are captured in the three theories (cognitive psychology, classical conditioning, economic) here discussed. For a fuller discussion of the theories, see *id.* at 273-87.

235. See *supra* notes 24-29 and accompanying text in connection with the work of Professors Redish and Baker.

236. BAKER, *supra* note 7, at 204; Shiffrin, *supra* note 30, at 1279-83.

237. As Professor Baker notes:

In our society, where the sense of self is frequently precarious and insecure, and where comparison with others and social recognition frequently serve to mold one's sense of personal identity, many people find their affirmation and personal fulfillment in making money, in making a profit, in being "successful" in their economic activities. In fact, prominent theorists have correlated the historical development of western industrial capitalism with the spread of the attitude that economic success is evidence of personal worth.

Baker, *Commercial Speech*, *supra* note 28, at 23 (citing RICHARD H. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* 114-15, 250-53 (1962)). See also MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 155-83 (Talcott Parsons trans. 1958) (tracing capitalism's focus on material wealth to the Puritan ethic that labor is the purpose

Criticism of the western commercial environment is widespread, reflecting many viewpoints and ideologies.²³⁸ Conservatives,²³⁹ liberals²⁴⁰ and Marxists²⁴¹ decry the view that persons are nothing but objects for commercial exploitation. Opposition to a society in which people are viewed as means not ends is a central theme of classic liberal writers from Kant to Locke, Rousseau, Mill, and Rawls.²⁴² These concerns prompted Professor Baker to argue that commercial speech should not receive First Amendment protection at all. He asserts that the dominance of commerce over speech inherent in commercial speech severs the "*connection between speech and any vision*" of the individual advertiser.²⁴³ Therefore, the speech is not freely chosen by the advertisers, but is coerced by the market.

In contrast, conventional marketplace theory urges that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."²⁴⁴ Accordingly, ideas cannot be suppressed merely because they are offensive or threatening. Viewed from the standpoint of conventional marketplace theory "[i]f people want to internalize or promote materialistic values, they ought to be free to do so."²⁴⁵

But the marketplace rationale seems "unduly romantic" in rela-

of life); SHIFFRIN, *supra* note 13, at 93 ("[O]ne could reasonably expect that daily exposure to televised commercialism would promote a hedonistic, acquisitive, materialistic, self-seeking, money-hungry culture."); Tracy Westen, *The First Amendment: Barrier or Impetus To FTC Advertising Remedies?*, 46 BROOK. L. REV. 487, 495 (1980) ("[S]ome advertisers believe their purpose is not to tell people how the product works, but how they will feel about themselves when they purchase it.");

238. Shiffrin, *supra* note 30, at 1280.

239. ROBERT A. NISBET, *SOCIOLOGY AS AN ART FORM* 77-78 (1977); Pope John Paul II, *Centesimus Annus* ("The Hundredth Year") (1991), reported in N.Y. Times, May 3, 1991, at 1, 7.

240. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* *passim* (1977) (presenting a theory of individual rights); ERICH FROMM, *THE SANE SOCIETY* 356 (1955) (concluding that in modern industrialized society, "[h]appiness becomes identical with consumption of newer and better commodities. . ."); RAWLS, *supra* note 41.

241. See, e.g., MAX HORKHEIMER, *ECLIPSE OF REASON* 141-44 (1947) (arguing that commercialization encourages sacrifice of individuality in favor of conformity); HERBERT MARCUSE, *ONE DIMENSIONAL MAN* 56-83 (1964) (arguing that in Western societies, technological progress has destroyed "higher culture").

242. Shiffrin, *supra* note 30, at 1280.

243. BAKER, *supra* note 7, at 202; Baker, *Commercial Speech*, *supra* note 28, at 17, 25.

244. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

245. Shiffrin, *supra* note 30, at 1281. This assumes rational people will be best enabled to make informed decisions through a "free trade of ideas."

tion to commercial speech.²⁴⁶ Here the relevant question seems to be whether the "free trade in ideas" is indeed free given the extent of trade and the relative dearth of ideas. To the extent that consumer choice is founded on coercion or deception, those responding to advertising have not consented, but have been manipulated. The basis for consumer choice inevitably depends on the factors that form contemporary culture.

Cultural inputs have a major influence in value formation. In relation to commercial speech,

the inputs promoting materialism in America are quite strong The authors of individual messages may not intend that general emphasis, but the whole is greater than the sum of the parts. Even if it were not, the parts add up to a loud materialist chorus.

Moreover, the promoters of the materialist message benefit from an almost classic case of market failure. Advertisers spend some sixty billion dollars per year to disseminate their messages. Those who would oppose the materialist message must combat forces that have a massive economic advantage. Any confidence that we will know what is truth by seeing what emerges from such combat is ill placed. The inequality of inputs is structurally based.²⁴⁷

246. *Id.*

247. *Id.*; see also Baker, *Commercial Speech*, *supra* note 28, at 27-29 (discussing profit motive and its capacity to shape media behavior); Fiss, *supra* note 104, at 1406-07 (discussing media access by differing economic classes). For instance, as Professor Baker notes:

Corporations have often enormously outspent other interests, frequently with telling results. For example, in a 1979 public power referendum in Westchester County, New York, the consolidated Edison Company of New York contributed \$1,200,000 to defeat the proposal. This was almost 80 times the \$16,000 spent by a citizens' group that provided the only organized support for the measure. Consolidated Edison's campaign overcame the measure's reported two-to-one initial public support, defeating the measure with 55 percent of the vote on election day.

Baker, *supra* note 7, at 222-23. Note also the comments of a Deputy Director of the Federal Trade Commission, Tracy Westen: "Children see 7,000 advertisements for sugared products each year, for example, yet they are rarely exposed to contrasting nutritional messages of equal persuasiveness." Westen, *supra* note 237, at 506 (footnote omitted). In analyzing this phenomenon, Westen concludes: "Although money does not guarantee success, it often provides a voice loud enough to virtually drown out that of the opposition." *Id.* at 510. Westen cites as examples various public interest referenda, passage of which would have reduced or eliminated profits, defeated by massive corporate spending. *Id.*

In sum, while commerce is surely important as a value or set of values in the marketplace of ideas, it threatens human values to the extent it dominates the marketplace. In America, the commercial message obviously saturates society. Nonetheless, the market failure argument has had limited appeal to the Court.²⁴⁸

4. Conclusion

From the standpoint of First Amendment theory, there is merit in the positions of both Professor Baker and conventional marketplace theory. Commercial speech is not core expression. Nevertheless, commercial speech disseminates important information and, therefore, is valuable in and of itself. In this way, commercial speech reveals an inner tension in the First Amendment. On the one hand, the "lesser status for commercial speech flatly contradicts conventional First Amendment principles."²⁴⁹ On the other hand, commercial speakers can and should be free to disseminate their messages. To resolve the tension arising from this complexity, a compromise is being formed in the area of commercial speech which allows commercial speech to be disseminated as other forms of speech, but subject to "greater community control of the time, place and manner of its dissemination."²⁵⁰ The resulting rule protects free speech values, but assigns more weight to communitarian interests than is tolerable in core free speech areas.²⁵¹ The compromise itself must be settled in the context of the concrete case.²⁵²

E. Justification for Greater Degree of Regulation

The potential of commercial speech to cause harm must also be

248. *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (rejecting argument that corporations dominated initiative campaign despite spending \$120,000 to opponents' \$7,000, and therefore rejecting any limitation on ability of corporations to spend money on campaign); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating a state statute granting a right of reply to political candidates attacked by newspapers); Shiffrin, *supra* note 30, at 1281 (rejecting the argument that the wealthy control candidates' political campaigns and, therefore, rejecting expenditure limitations on such campaigns); see also BAKER, *supra* note 7, at 220-23. But see *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 207-08 (1982) (upholding severe limitation on corporate entities' opportunities to solicit funds for political speech).

249. Shiffrin, *supra* note 30, at 1282.

250. *Id.*

251. See *infra* notes 253-80 and accompanying text.

252. See *infra* notes 281-442 and accompanying text.

considered in determining the place of commercial speech within First Amendment theory. Ultimately, harm provides the only sound basis on which to restrict speech.²⁵³ Moreover, only concrete harm of sufficiently strong magnitude and likely imminence justifies restriction.²⁵⁴ Harm of this sort is, of course, made manifest by the communitarian interests asserted to justify curtailment of speech. With respect to commercial speech, those interests include misrepresentation, deception, coercion, false and misleading speech and unconscionability.²⁵⁵

Assuming some instances of harmful commercial speech, the next relevant inquiry is how sharply regulation may be drawn to advance those interests without compromising free speech values. Regulation of commercial speech can generally be tailored relatively precisely. There are three main reasons for this: verifiability, durability and the fact that regulation can be more socially beneficial than detrimental.

1. Verifiability

Commercial speech can be verified. The Court in *Virginia Pharmacy* stated the essential rationale: "The truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else."²⁵⁶ The Court's characterization

253. "Mill thought it was useful to prohibit speech only when it was likely to cause harm or, more precisely, harm to the interests of others." Shiffrin, *supra* note 30, at 1262 (citing J.S. MILL, ON LIBERTY 12, 53 (D. Spitz ed. 1975)). If speech is not harmful, attempts to restrict it must be aimed at suppressing the message the speaker intends to convey.

254. As Professor Schauer paraphrases the test of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), "[i]f the act is directed toward and is likely to incite or produce imminent lawless action of significant magnitude, then deny protection." Schauer, *Categories*, *supra* note 61, at 298.

255. See *supra* text accompanying note 223.

256. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). Or, as Justice Stewart put it:

Since the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought. Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection — its contribution to the flow of

may be both overinclusive and underinclusive in practice. Certainly some political advertising, commentary and news reporting is relatively verifiable; conversely, some commercial speech is difficult to verify.²⁵⁷ However, the essential point that commercial speech is relatively verifiable should not be lost.²⁵⁸

Because commercial speech is a second-order category of speech and because the state interests underlying regulation of commercial speech are relatively strong, a greater degree of regulation may be tolerable as compared to core speech. To the extent commercial speech can be verified, regulations may be narrowly tailored to address the problems identified. When false and misleading aspects are unmasked from the true and eliminated, the speech remaining will be far less likely to pose harm. The verifiability of commercial speech thus enables the state to act reasonably to achieve the legitimate goal of impeding false or misleading advertising.²⁵⁹

Government regulation of any sort will obviously be subject to criticism for producing outcomes inconsistent with regulatory objectives, and "government regulation of information is no exception."²⁶⁰ Results consistent with regulatory objectives will depend on the government's ability to identify subjects warranting regulation. Whether or not the false or misleading can then be unmasked from the true in any given case of commercial speech is, of course, an open question. The legal system is generally not good at ascertaining the truth of speech, particularly political, scientific, artistic or literary speech where the official record is, in fact, quite bad.²⁶¹ On the other hand, the First Amendment tradition does

accurate and reliable information relevant to public and private decisionmaking.
Id. at 780-81 (Stewart, J., concurring).

257. See, e.g., *supra* note 113 (citing misleading political claims which could have been verified). Prominent commentators have pointed out the verifiability of some political speech and the difficulty of verifying some commercial speech. See, e.g., Farber, *supra* note 124, at 385-86; Redish, *Free Speech*, *supra* note 25, at 633; Shiffrin, *supra* note 30, at 1218.

258. Cass, *supra* note 13, at 1370-72. For examples of the verifiability determinant in operation, see *infra* text accompanying notes 366-79, 388-420. As suggested here, "[w]e must be opportunistic and grab progress where we can find it." D. HERZOG, WITHOUT FOUNDATIONS 243 (1985).

259. See *supra* notes 257.

260. Cass, *supra* note 13, at 1372.

261. See, e.g., ANNE L. HAIGHT, BANNED BOOKS: INFORMAL NOTES ON SOME BOOKS BANNED FOR VARIOUS REASONS AT VARIOUS TIMES AND IN VARIOUS PLACES (3d ed. 1970); Edward J. Eberle, *Prior Restraint of Expression Through the Private Search Doc-*

not tolerate such intrusion into core areas.

But the system's record with respect to core speech areas does not apply with the same force to commercial speech. Here the legal and regulatory system seems to operate fairly effectively in unmasking the false or misleading from the true. Courts are experienced in unmasking the false or deceptive from the true in conjunction with contract, consumer protection and other private law actions.²⁶² Some regulatory agencies that handle speech questions also seem to function well.²⁶³ Note particularly that the Court has found the "experience of the FTC . . . instructive."²⁶⁴ Assuming such regulation can be accomplished accurately, it seems appropriate to rely on these relatively sound legal and regulatory regimes to sort out issues of truth or falsity in commercial speech. Such regulation appears to dovetail with the constitutional concern of imposing only minimal restrictions on speech.

2. Durability

Durability is another characteristic of commercial speech that makes a greater degree of regulation possible. Commercial speech is durable in the sense that the profit motive inherent in commercial speech better assures its survival even in the face of regula-

trine, 17 U.S.F. L. REV. 171, 181-84 (1983).

262. "A false representation regarding the price, quality, or quantity of a good or service offered for sale can usually be unmasked in a legal proceeding without a great expenditure of time and money or a great risk of error." Richard Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 39-40 (1986). Judge Posner sensibly argues that truth or falsity marks the dividing line between socially beneficial and detrimental commercial speech.

263. The Federal Trade Commission ("FTC") regulates misleading advertising and the Securities and Exchange Commission ("SEC") regulates misleading speech with respect to corporate and securities matters. For a discussion of FTC speech regulations, see GLEN O. ROBINSON ET AL., *THE ADMINISTRATIVE PROCESS* (3d ed. 1986) (collecting cases); Calvani et al., *supra* note 168, at 781-88; Ira M. Millstein, *The FTC and False Advertising*, 64 COLUM. L. REV. 439 (1964); Westen, *supra* note 237, at 498 (suggesting that "intervention in the marketplace of commercial speech by the FTC and other government agencies may be appropriate precisely because that marketplace functions imperfectly — by failing to eliminate falsity and failing to generate necessary information"). For a discussion of SEC regulation, see LOUIS LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 562-67 (1983) (information statements); Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322 (1979). Accord Cass, *supra* note 13, at 1372 ("comparative point holds" as to benefits of commercial speech regulation); Schauer, *Architecture*, *supra* note 61, at 1187 n.28 ("the argument is one of comparative competence . . . with respect to commercial speech [regulation]").

264. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 649 (1985).

tion. After all, "advertising is the *sine qua non* of commercial profits."²⁶⁵ Moreover, commercial speech does not generally involve unpopular or dissenting views, the expression of which can be particularly vulnerable to the chilling effect of regulation.²⁶⁶ Indeed, the fact that commercial "speech" existed even when unprotected by the First Amendment evidences its durability.

Again, this characterization is both overinclusive and underinclusive.²⁶⁷ Commercial speech is neither verifiable nor durable in all cases. Still, the relative durability of commercial speech when compared with core speech obviously lessens the danger that valuable communications will be chilled.²⁶⁸

3. Benefits Can Outweigh Costs of Regulation

Verifiability and durability are critical to efforts aimed at advancing legitimate state interests while minimizing the errors of regulation.²⁶⁹ Recent economic literature indicates that commercial speech may be regulated relatively accurately and efficiently without harming free speech values.²⁷⁰ Assuming the legitimacy of these findings, the economic perspective on regulation of commercial speech dovetails with the First Amendment principle of tolerating restrictions on free speech only in the face of strong state

265. *Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 772 n.24 (1978). In the same footnote, the Court spoke of "commonsense differences between speech that does 'no more than propose a commercial transaction' and other varieties." *Id.* at 771 n.24 (quoting *Pittsburgh Press Co. v. Pittsburgh Human Relations Comm'n*, 413 U.S. 376, 385 (1973)). These "commonsense differences" were verifiability and durability. *Id.*

266. Eberle, *supra* note 261, at 181-84 (discussing how unpopular views can be chilled by prior restraints). Of course, some commercial speech might be viewed as disseminating unpopular views. Consider, for example, the abortion services advertised in *Bigelow v. Virginia*, 421 U.S. 809 (1975), or the contraceptive devices discussed in *Zauderer*, 471 U.S. 626.

267. See, e.g., Redish, *Free Speech*, *supra* note 25, at 633-35; see also *supra* note 257 and accompanying text. Still, commercial speech is generally more verifiable and more durable than core speech. Cass, *supra* note 13, at 1368-73.

268. However, no category of speech is completely immune from the chilling effects of regulation. In commercial speech, these effects seem increasingly evident. See *infra* text accompanying notes 330-64.

269. Cass, *supra* note 13, at 1372; Kenneth Dau-Schmidt, *Comments on Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1383, 1391 (1988).

270. See generally Cass, *supra* note 13, at 1355-73 (discussing the ease with which commercial speech can be regulated); Dau-Schmidt, *supra* note 269, at 1387-95 (same); Posner, *supra* note 262, at 39-40 (concluding, after economic analysis, that little or no change to commercial speech standards is necessary).

interests, and then only in minimally intrusive ways. Nevertheless, any regulatory regime should be applied with a keen eye on the government. Official bias in regulation is always a concern, especially with respect to speech where the record of government intrusion is not commendable.²⁷¹ While obvious bias against commercial speech does not exist, the danger of official bias in the commercial speech category is only reduced, not eliminated.²⁷²

Regulation need not be detrimental, even if it affects speech rights. In fact, consumers and society generally could gain significant benefits from regulation of commercial speech. The government could function, optimally, as an effective guarantor of the truth of commercial speech.²⁷³ As the Court in *Virginia Pharmacy* suggested, "the State [may] insur[e] that the stream of commercial information flow[s] cleanly as well as freely."²⁷⁴

Verification of commercial speech is the key to this rationale approving regulation. If the government were to test products and services against the claims made by advertisers, consumers would have an accurate source of information from which to make reliable consumption decisions. Consumers could rely on advertisements without testing products and services themselves and without having to discount the claims advanced in the marketplace. Widespread efficiencies and economies of scale could then be achieved. For example, the informational value of commercial speech could be freely promoted, thereby mitigating the adverse social and economic effects arising from market imperfections that so concerned Justice Blackmun.²⁷⁵ Viewing regulation from both the cost and benefit side of the equation, regulation can more easily be justified in the commercial speech area.²⁷⁶

Of course, regulation of commercial speech must be applied fairly, accurately and without harm to speech values. Over-regulation of commercial speech will chill valuable viewpoints. To the extent speakers respond to government's rules with silence, regulation undermines the informational value of commercial

271. See *supra* note 261 and accompanying text (discussing the legal system's inability to ascertain truth in political or artistic speech).

272. See *infra* text accompanying notes 330-64.

273. Dau-Schmidt, *supra* note 269, at 1384, 1392.

274. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 743, 772 (1976).

275. See *supra* text accompanying notes 164-68.

276. Dau-Schmidt, *supra* note 269, at 1392-93.

speech by inhibiting truthful assertions along with falsehoods.

Regulations justifiable in the commercial speech area do not carryover to core speech. As a matter of architectural integrity, core speech demands greater deference from the state than the second order categories exemplified by commercial speech.²⁷⁷ Furthermore, theoretical and practical restraints impede regulation in core areas of expression. Official regulation of political speech presents an inherent conflict of interest; the government itself is a major competitor in this marketplace of ideas. Regulation in the commercial area is far less likely to be driven by partisanship or self-interest.²⁷⁸ Experience indicates that government does not regulate core speech well.²⁷⁹ Political, academic, scientific and artistic ideas are too subjective to be amenable to even-handed regulation.²⁸⁰ As a result, the net cost of regulating core speech through bureaucratic mechanisms far exceeds any benefit to be gained from attempts to do so. Instead, every member of society participates directly in regulating core speech. Every politician, artist, academician, scientist and listener of core speech represents a consumer whose support speakers must rally to win market share in the marketplace of ideas.

4. Conclusion

The regulatory model outlined above serves two related functions. The exercise of assessing regulations provides a good means of identifying commercial speech as such and, in turn, protects its essential free speech value. Commercial speech is characterized by its verifiability and durability. Testing speech for those qualities focuses attention toward the goal of fitting regulation precisely to justifiable state interests without harming free speech values. Regu-

277. See *supra* text accompanying notes 201-10.

278. Dau-Schmidt, *supra* note 269, at 1393; T. M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 541 (1979) ("[C]ommercial speech [is] subject to restrictions that would not be acceptable if applied to other forms of expression, . . . first because there are reasonably clear and objective criteria of truth in this area, and second, [because] we regard the government as much less partisan in the competition between commercial firms than in the struggle between religious or political views."); Shiffrin, *supra* note 30, at 1265, 1269, 1270.

279. Eberle, *supra* note 261, at 181-84; Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 135-38 (1989).

280. A breach of the equal value principle should only be tolerated where reasonably reliable objective determinants indicate disparities warranting different treatment. See *supra* text accompanying notes 204-06.

lation so tailored helps weed out harmful aspects of advertising, unhusking the essential kernel of commercial speech — truthful, nondeceptive information — that makes it useful for private and public decisionmaking. The regulatory approach also serves the ultimate objective of distinguishing commercial from core speech, thereby safeguarding core speech through architectural cohesion.

IV. METHODOLOGY FOR COMMERCIAL SPEECH ANALYSIS

The tensions in commercial speech described above are perhaps best resolved through development of clear general rules that can guide analysis in this area. This section sets forth these general rules, explaining the rationale for each rule and the way in which it offers coherence and structure to commercial speech methodology. The rules proposed here are as follows:

Rule 1: Truthful, nondeceptive, noncoercive speech may not be regulated except in the face of truly compelling governmental interests.

Rule 2: Truthful speech that contains elements of, or is disseminated in a manner that causes deception, coercion, duress or harassment may be regulated. To regulate such speech, government bears the burden of proving (1) the presence of a substantial interest, (2) that the regulation directly advances the asserted interest, and (3) that the restriction on speech is no greater than necessary to serve the interest.

Rule 3: False information may be regulated.

Speech cannot, of course, always be neatly classified as “true” or “false.” Much expression contains elements of both truth and falsity. If speech mixes truth with falsehoods, resort to Rule 2 is proper. Within Rule 2, proper attention can be focused on separating truthful from untruthful or misleading speech and on fashioning the proper accommodation of values. Other speech will be patently true or false and, therefore, properly subject to either Rule 1 or Rule 3. Cases falling within the purview of these Rules will illustrate the central and clear solutions to problems at the extremes of the commercial speech spectrum. The most difficult questions posed by commercial speech will be worked out according to the formula offered by Rule 2. Viewed together, the three general Rules help order analysis in the commercial speech area, providing coherence and structure to commercial speech methodology.

A. Rule 1: Truthful Speech

Rule 1 does not differ from the standard analysis applicable to core speech areas. A rule barring regulation of truthful commercial speech is correct because truthful, nondeceptive and noncoercive commercial speech is indistinguishable in its material aspects from truthful noncommercial speech which receives strong protection under the First Amendment. Truthful speech goes to the heart of the Amendment's guarantee of expression: dissemination of information and ideas. Thus, it follows that government cannot regulate truthful speech except in cases of compelling interests. To the extent authorities interfere with the dissemination of truthful information, they manipulate speech and deprive members of the public of expression they may find useful in structuring their activities.²⁸¹ As a result, government violates freedom of choice, altering our vision without justification.²⁸²

When government regulates truthful speech, it must demonstrate a need to promote a truly compelling interest which justifies a breach of the Amendment's guarantee against restraint of expression. To determine whether such a breach is tolerable, the Court should invoke strict scrutiny analysis which does not differ from the analysis applicable to intrusions upon core areas of speech. In other words, the Court should determine independently the purpose for the regulation and require the responsible authorities to establish the "compelling" or "overriding" interest purportedly served by it.²⁸³ The interest must be one whose value is so great that it justifies derogating the speech at issue from the preferred position typically accorded free speech in our value system. Moreover, even if the government can demonstrate a "compelling" interest, the Court will not uphold the regulation unless it concludes that the

281. See *Posadas de P.R. Ass'n v. Tourism Co. of P.R.*, 478 U.S. 328, 350-51 (1986) (Brennan, J., dissenting) (arguing that no differences between commercial and other kinds of speech justify protecting commercial speech less when the government deprives citizens of truthful information about lawful activities).

282. Government control of truthful commercial speech is exactly the type of "paternalistic" conduct the Supreme Court decried in *Virginia Pharmacy*. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

283. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 576-77 (1980) (Blackmun, J. concurring) (arguing that a strict standard of review applies to suppression of commercial information); NOWAK et al., *supra* note 13, at 530-31 (discussing the standards of judicial scrutiny applicable in equal protection cases, including those involving a fundamental right like freedom of expression).

regulation is necessary to achieve the compelling interest. Regulations which, upon close analysis, are overly broad, too vague or not the least restrictive means available to the government will be invalidated.²⁸⁴ Consistent with the preferred value of free speech, the range of governmental actions surviving strict scrutiny should be exceedingly narrow.

B. Rule 2: Speech With Elements of Deception, Coercion, Duress or Harassment

Rule 2 acknowledges the subordinate position of much commercial speech and is designed to sort out the innate tensions in such speech. The general rule applicable to this "mixed" commercial speech represents an intermediate level of heightened scrutiny. Any permissible regulation of expression must advance "substantial" governmental interests and be narrowly drawn so that the restriction is no more extensive than necessary to serve the identified interest.

The four-part test framed by the Court in *Central Hudson* provides essentially the correct approach:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.²⁸⁵

Several comments are necessary to clarify and then reformulate the *Central Hudson* test so that it will properly reflect the preferred value of speech in the accommodations to be struck pursuant to it.

The Court is clearly right in requiring that reviewing panels first "determine whether the expression is protected by the First Amendment."²⁸⁶ It is essential to protection of the Amendment that courts determine the free speech value of the expression at issue apart from any governmental characterization that could be

284. NOWAK et al., *supra* note 13, at 829.

285. *Central Hudson*, 447 U.S. at 566.

286. *Id.*

inappropriately skewed toward its position in the controversy. However, the Court is wrong in asserting that "for commercial speech to come within that provision, it at least must concern lawful activity."²⁸⁷ Mere advocacy of unlawfulness has been rejected as a basis on which to punish speakers.²⁸⁸ Instead, the government must show that the speaker intends to incite lawless behavior and that such behavior is likely to follow from the advocacy.²⁸⁹ Requiring proof that advocacy will lead to such serious harm deprives governmental authorities of the opportunity to manipulate the laws they enact to have the effect of restricting unpopular speech, including commercial speech. If the "lawful activity" standard were to control, governments' attempts to channel conduct along preferred routes would have the added effect of regulating, indirectly, speech contrary to the laws prescribing the underlying conduct.²⁹⁰ Conversely, dissemination of truthful information does not necessarily make the activity lawful. History is replete with examples of activities disseminating useful, truthful information which were considered unlawful at the time.²⁹¹

Citizens should be as free to determine "truth" as the state. To the extent that the government can control the exchange of information and ideas, government impedes citizens' search for the truth. The "lawful activity" standard confers on the government greater ability to control the exchange. For this reason, the *Central Hudson* Court's suggestion that First Amendment protection be predicated on "lawful" activity is contrary to core speech values and, therefore, should be eliminated. Nevertheless, government may have legitimate and substantial interests in regulating speech to prevent unlawful activities.²⁹²

287. *Id.*

288. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

289. *Id.*

290. *See, e.g., Posadas de P.R. Ass'n v. Tourism Co. of P.R.*, 478 U.S. 328 (1986). *Posadas* is discussed *infra* notes 330-47 and accompanying text.

291. Redish, *supra* note 124, at 445. *See, e.g., Abrams v. United States*, 250 U.S. 616 (1919) (defendants convicted under Espionage Act of 1917); *Schenck v. United States*, 249 U.S. 47 (1919) (defendants convicted under the Espionage Act of 1917 for conspiring to obstruct the draft).

Similarly, dissemination of truthful information may not be morally correct. *See D'Amato & Eberle, supra* note 85, at 795-98 (1983) (discussing whether a lawyer would have been ethically required to disclose information as to the whereabouts of a fugitive slave in pre-civil war years).

292. *See, e.g., National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 697-98 (1978) (affirming district court's injunction prohibiting the society from discourag-

Rule 2 may be the best method of ensuring fidelity to the First Amendment, because it allows courts to independently scrutinize the First Amendment value of the speech at issue prior to forging an accommodation. With judicial assessment of First Amendment values under the Rule 2 formula, there is greater likelihood that any accommodation reached will properly reflect the preferred position of free speech in our society. However, that accommodation will also account for the government's prerogative to remedy unlawful activity where the harm posed by that activity is sufficiently serious to outweigh the First Amendment values at issue.

The *Central Hudson* Court indicated that commercial speech cannot be misleading if it is to enjoy First Amendment protection. As with the "lawful activity" requirement, the Court erred in excluding misleading speech categorically. Misleading speech, by definition, combines truthful elements with false ones.²⁹³ Rather than completely suppressing speech that is "misleading," the focus should shift to separating misleading from truthful aspects in order to protect the kernel of value, truthful information, free speech promotes. Ideally, this is what the legal system does in contract, consumer protection, securities and labor law contexts.

The proper accommodation may then be fashioned by critically evaluating these separate elements of misleading. Of course, the result will depend on the values and statements at issue in any given case. Generally, however, the remedy "is to open the channels of communication rather than to close them."²⁹⁴

With respect to the remaining elements of the *Central Hudson* test, the Court was correct and the analysis need not be modified. Courts must "ask whether the asserted governmental interest is substantial."²⁹⁵ Official interests need only be "substantial," not "compelling." This approach is consistent with a second-order cat-

ing its members from underbidding one another, since such bidding violates antitrust laws); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rights*, 413 U.S. 376, 389 (1973) (holding that the First Amendment did not protect a newspaper's placement of employment advertisements where the activity advertised, gender-based discrimination in hiring, was illegal).

293. Truth might also be combined with coercion, harassment, duress or unconscionability to constitute misleading speech.

294. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Of course, the government has a legitimate interest in "insur[ing] that the stream of commercial information flow cleanly as well as freely." *Id.* at 772.

295. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

egory of expression. Courts should be attentive to justifications proffered by the state and confine authorities' actions to their stated purposes.²⁹⁶ Only after a court has decided from the evidence before it that the speech at issue is protected and that the government's competing interest is substantial should the court "determine whether the regulation directly advances the governmental interest."²⁹⁷

Finally, the regulation must be tailored narrowly to the interest. "[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive."²⁹⁸ Moreover, the nature of the restrictions tolerated here should be qualitatively consistent with the interests to be served. A least restrictive means standard is appropriately deferential to free speech.²⁹⁹

In light of these comments, a properly reformulated test for Rule 2 is as follows:

First, we must determine whether the commercial expression is protected by the First Amendment. Second, we ask whether the asserted governmental interest is substantial. Third, if both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest. And fourth, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive.

To answer the first question, one need largely look to see whether the values set forth above are present.³⁰⁰ There may, of course, be First Amendment values beyond those listed. Question

296. *Cf. United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 186 (1980) (Brennan, J., dissenting) (opining that classification which deprived some railroad retirees of their benefits "directly conflict[ed] with Congress' stated purpose . . . to preserve the . . . benefits of [those] who had already qualified for them").

297. *Central Hudson*, 447 U.S. at 566.

298. *Id.*

299. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644 (1985) (holding that "prophylactic rules" prohibiting commercial speech cannot be so broad as to prohibit speech of a type not justifying the rule). *But see Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989) (concluding that "something short of a least-restrictive-means standard" is "'commensurate with [the] subordinate position [of commercial speech] in the scale of First Amendment values'" (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978))).

300. See *supra* notes 131-82 and accompanying text.

two in the methodology, whether or not "substantial" governmental interests are present, can be answered in most instances by reference to the contractual function of commercial speech.³⁰¹ That leaves questions three and four in the methodology for working out an appropriate accommodation. Regulation of speech must be protective of it and minimally intrusive while directly advancing substantial interests.

Case law points the way toward fashioning such accommodations. The tools available to courts include affirmative disclosure or disclaimer requirements, a preference for written communication over other media and reasonable time, place and manner restrictions. These tools generally serve to protect core speech values in the dissemination of ideas and information and, yet, mitigate the harm of deception, coercion, overreaching or other substantial interests. They also help channel speech away from the borderline between truth and falsity toward truth. Appropriate accommodations reflecting more detail can be forged in concrete contexts.³⁰²

C. Rule 3: False Information

The final rule for commercial speech analysis holds that false information does not merit protection under the First Amendment and, accordingly, may be regulated. Situations may exist, however, in which it is necessary to tolerate factual errors in order to give speech "breathing room."³⁰³ Penalizing advertisers for every factual error no matter how insignificant would chill commercial speech. Cautious advertisers may avoid making any assertions of fact, thus undermining the informational value of commercial speech.³⁰⁴ Moreover, the truth or falsity of information conveyed will not always be readily apparent to consumers or to those who would be charged with policing advertisements. Accordingly, ac-

301. The contractual function approach is discussed *supra* text accompanying notes 218-23. Case law will serve as an important guide to other substantial interests. *See, e.g.*, *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 697-99 (1978) (antitrust policy); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363-84 (1977) (professionalism of attorneys); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-73 (1976) (professionalism of pharmacists); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (equal employment opportunities for men and women).

302. *See infra* text accompanying notes 307-442.

303. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (recognizing that some erroneous statements should be tolerated so that speech is not chilled).

304. *See supra* text accompanying notes 164-68.

commodations should err on the side of protecting the flow of information so that the exchange of ideas which will undoubtedly follow will clarify the veracity of the initial speech.³⁰⁵

Beyond these values, however, patently false statements relating to commerce contribute little to the value of free speech. Regulation of objectively false information conforms with free speech theory.³⁰⁶ We have little interest in false information. False information does not add to our knowledge; it prolongs our ignorance of the truth. False information does not further our vision of reality or life; it clouds our perception. In short, false information implicates relatively few First Amendment values. Furthermore, citizens who rely on false statements may suffer some harm as a result. This potential for adverse consequences gives rise to substantial state interests. Accordingly, government is justified in regulating false speech.

V. APPLYING THE PRACTICAL REASONING METHODOLOGY

This part of the article applies the practical reasoning model to several paradigm problems in commercial speech. It focuses on striking balances between free speech values and governmental interests in concrete contexts. Demonstrating the analysis here furthers the practical aim of the article to lend guidance to judges and other decisionmakers who must actually resolve these cases. The commercial speech model presented also provides a framework for solving more general free speech questions.

The primary methodology employed here derives from the three general rules developed above. These rules offer coherence and structure to analysis of commercial speech questions. The analytical model cabins judicial discretion within the rules and applies them in a principled manner to yield results wholly consistent with the

305. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1973). The notion of tolerating false speech can be attributed to John Stuart Mill, "who believed that even views that we know to be false deserve protection, because their expression makes the truth appear even stronger by contrast." REDISH, *supra* note 6, at 46 (citing J.S. MILL, *ON LIBERTY* 34-35 (1947)). Consistent with this hypothesis, false factual information might itself possess value and promote another "branch of self-realization: the development of one's human faculties, recognized as an end in itself." *Id.* at 57.

306. Throughout the balance of this article, "false" information or speech indicates patently untrue assertions.

First Amendment tradition. As this article has argued, practical reasoning can best accomplish these goals.

Faced with speech contrary in some respect to government interests, courts must forge an accommodation to resolve the controversy. To begin this process, a court must carefully identify the free speech values implicated. This analysis should be a critical, disinterested evaluation of the pertinent issues. The competing values identified must then be ranked according to their importance.³⁰⁷ Generally, such an evaluation will lead to categorization of the case within one of the three rules. Cases falling within the parameters of Rules 1 and 3 can be resolved relatively easily. For example, truthful commercial speech (the Rule 1 case) should be favored for its promotion of free speech values absent a compelling interest proved by the state. Similarly, false advertisements (the Rule 3 case) should be subjected to the full weight of government regulations designed to silence them.

That leaves Rule 2 for working out the close cases in which free speech values compete with strong state interests. In applying Rule 2, courts must make an especially careful, principled and dispassionate choice of the value or values which predominate.³⁰⁸

Use of the three rules in combination with practical reason has the effect "of reducing but not eliminating entirely the reliance on intuitive judgments."³⁰⁹ The methodology helps focus attention on the "practical aim" of courts in "reach[ing] a reasonably reliable agreement"³¹⁰ about First Amendment cases. Nevertheless, even this approach may ultimately be only an "illuminating approximation of what inevitably remains a quest for more certain resolution" as Grand Theory and moral philosophy purport to offer.³¹¹

307. Cf. Eberle, *supra* note 53, at 20 (advocating a similar approach for resolving attorneys' moral dilemmas when faced with conflicting rules of professional ethics).

308. *Id.*

309. RAWLS, *supra* note 41, at 44, cited in Eberle, *supra* note 53, at 19. Importantly, the methodology proposed also helps reduce official bias. Cf. *supra* text accompanying notes 271-72.

310. RAWLS, *supra* note 41, at 44, cited in Eberle, *supra* note 53, at 19.

311. Eberle, *supra* note 53, at 19 (citing RAWLS, *supra* note 41, at 45); cf. Farber & Frickey, *supra* note 5, at 1652 (suggesting that while absolute truth is not in all ways humanly attainable, "something less may still suffice").

A. Rule 1 Truthful Speech: Suppression of Truthful Speech is Rarely, If Ever, Warranted

Much commercial speech jurisprudence fits under Rule 1. The *Virginia Pharmacy* paradigm makes clear that truthful, nondeceptive, noncoercive information concerning the availability, price, quantity and quality of products and services is worth protecting under the First Amendment for the reasons discussed above.³¹² The *Virginia Pharmacy* rationale of protecting truthful information from complete suppression can be extended broadly, easily covering advertising of most goods and services. As a corollary, the scope of official restrictions of commercial speech should be severely restricted where truthful information is conveyed.

1. *Virginia Pharmacy* Applied to the Professions

Another case fitting squarely within the *Virginia Pharmacy* model is *Bates v. State Bar of Arizona*.³¹³ *Bates* concerns the dissemination of truthful information about the availability, price and type of routine professional legal services, "such as uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of names."³¹⁴ As in *Virginia Pharmacy*, the Supreme Court ruled that dissemination of this information cannot be subject to blanket suppression. The Court explained the case as follows:

The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.³¹⁵

The *Bates* rule should extend to protect truthful advertising of any professional service from suppression by regulators.

Nevertheless, specific instances of advertising raise concerns that compete with the Court's decision to extend First Amendment

312. See *supra* text accompanying notes 131-82.

313. 433 U.S. 350 (1977).

314. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 354 (1977).

315. *Id.* at 384.

protection. Advertising in the legal field presents "peculiar problems" which could warrant state intervention.³¹⁶ For example, advertising relating to the quality of legal services would be difficult for consumers to judge or verify.³¹⁷ Similarly, "in-person" solicitation could subject vulnerable potential clients to undue influence by trained advocates.³¹⁸ The state has a significant interest in preventing these problems. As a result, the free speech protection for professional advertising may have to accommodate these contrary concerns. However, such an undertaking would be the focus of a Rule 2 analysis.³¹⁹

2. Equal Protection of Speaker Interests — *Central Hudson*.

The *Virginia Pharmacy* rationale of protecting dissemination of truthful information and ideas from complete suppression further extends to protection of all speakers' interests. For instance, *Central Hudson* illustrates that corporations, like pharmacists and attorneys, enjoy First Amendment protection from complete suppression of their advertisements.³²⁰ In *Central Hudson*, the Public Service Commission of New York attempted to prevent a utility from sending its customers advertisements promoting the use of electricity.³²¹ The Court struck down the prohibition as overbroad in relation to the asserted state interests.³²² As the *Central Hudson* Court observed, a speaker's corporate status, even its "monopoly position, does not alter the First Amendment's protection for its commercial speech."³²³ Liberty and equality are two core free speech values that, at a minimum, mandate equal access for all

316. *Id.* at 366.

317. *Id.*

318. *Id.*

319. The *Bates* Court did not balance the concerns mentioned above against First Amendment values because those problems were not at issue. *Id.* at 367-68. Rather, the Court considered restrictions on price advertising by attorneys, *id.*, and concluded that no justification for restrictions directed at price advertising warranted absolute suppression of attorney advertising. *Id.* at 379.

Detailed treatment of specific problems in attorney advertising is taken up in the case law that subsequently unfolded, some of which is discussed *infra* notes 366-433 and accompanying text.

320. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570-71 (1980).

321. *Id.* at 558.

322. *Id.* at 570-71.

323. *Id.* at 568.

speakers to the streams of information. Such equality also helps protect important listener interests in speech.

Problems of market failure and structural imbalance may counter these interests to some extent. Affirming corporations' right to disseminate truthful advertising should not be an excuse for sanctioning widely disparate impact in all cases.³²⁴ Accordingly, at a certain point it seems reasonable to conclude that the volume of corporate commercial speech crosses the line separating speakers' equal access and listeners' freedom of choice from speaker inequality and concomitant listener coercion. In such situations, the balancing of interests would favor reasonable time, place and manner restrictions.³²⁵

The speech at issue in *Central Hudson* was truthful and contained no element of deception or coercion.³²⁶ Accordingly, its proper treatment is under Rule 1, not Rule 2. The Court's four-part analysis, which more closely resembles Rule 2,³²⁷ illustrates the need for generally reliable rules by which to answer free speech questions.³²⁸ It follows that these rules should be applied in a careful and principled manner, as supplied by practical reasoning. The outcome in *Central Hudson* represents an unfortunate example of how traditional legal reasoning may not be suited to the task of upholding First Amendment values.³²⁹ Practical reasoning offers a

324. Dominant corporate commercial speech could also pose a threat to liberty and equality values. Professor Baker notes the disproportionate impact corporations can have on issues by dipping into their deep pockets to fund advertising campaigns. BAKER, *supra* note 7, at 218-23. Baker observes that "[c]orporations have often enormously outspent other interests, frequently with telling results." *Id.* at 222. See also Fiss, *supra* note 104, at 1406-08 (positing that during the 1970's when the Supreme Court found conflict between the First Amendment and capitalistic concern, capitalism prevailed); Shiffrin, *supra* note 30, at 1236 (concluding that the Court has used "the first amendment as a weapon" to suppress political speech and promote commercial speech). Corporate political speech is a topic beyond the scope of this article. Obviously, the problems raised are difficult to reconcile with free speech values and merit careful attention.

325. See *supra* notes 224-48 and accompanying text. Concerns arising from perceived inequality due to market failure or structural imbalance present cases to be resolved according to the Rule 2 formula.

326. *Central Hudson*, 447 U.S. at 566.

327. See *supra* text accompanying notes 285-302.

328. *Central Hudson*, 447 U.S. at 566. Under Rule 2, courts must assess the government interest advanced as justifying a challenged regulation only when the speech at issue, though truthful, contains elements of, or is disseminated in a manner that causes, deception, coercion, duress, harassment or similarly substantial interests. A proper application of Rule 1, on the other hand, denies the validity of any regulation applied to truthful, nondeceptive, noncoercive speech, except regulations further compelling interests. See *supra* text accompanying notes 281-84.

329. The four-step analysis in *Central Hudson* is a departure from previous methods of

sounder means of reaching reasonably reliable and more predictable outcomes that remain faithful to the Free Speech Tradition.

3. The Need for Practical Reason — *Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico*

Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico illustrates graphically the need for First Amendment jurisprudence incorporating practical reason.³³⁰ In *Posadas*, the Court sustained a Puerto Rican statute forbidding advertisements of casino gambling directed at Puerto Rican nationals, even though casino gambling was legal in Puerto Rico and Puerto Rico advertised the activity widely outside the commonwealth.³³¹ If *Virginia Pharmacy* is a paradigm of First Amendment analysis, then *Posadas* is a view through the opposite side of the looking glass.³³² In *Posadas* the Court failed to fulfill its constitutional function to determine independently the free speech value of the expression in question, which was concededly the truthful, nondeceptive, and noncoercive advertisement of gambling casinos. Instead, the Court blindly deferred to social regulation. Under the practical reasoning methodology advocated here, Rule 1 would apply to this type of truthful speech.

Under Rule 1, the Court would invoke strict scrutiny analysis in order to determine whether the purported interest asserted to justify the restriction on speech is "compelling." The trial court found that Puerto Rico's interest in suppressing advertising aimed

determining whether commercial speech is protected by the First Amendment. Compare *Central Hudson*, 477 U.S. at 566 (describing the four-step analysis used to determine "whether the expression is protected by the First Amendment") with *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (affirming that reasonable time, place, and manner restrictions can be applied to commercial speech, but concluding that those restrictions were exceeded by the Virginia Pharmacy statute). As Justice Blackmun, stated in his *Central Hudson* concurrence: "I concur only in the Court's judgment . . . because I believe the test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech." *Central Hudson*, 447 U.S. at 573 (Blackmun, J. concurring).

330. 478 U.S. 328 (1986).

331. *Id.* at 348.

332. See Philip B. Kurland, *Posadas de Puerto Rico v. Tourism Company*: "'Twas Strange, 'Twas Passing Strange: 'Twas Pitiful, 'Twas Wondrous Pitiful,'" 1986 SUP. CT. REV. 1, 6 ("When Oliver Wendell Holmes told us that: 'The life of the law has not been logic; it has been experience,' he was not suggesting the abandonment of reason." (footnote omitted)).

at its residents was to reduce the demand of casino gambling by them.³³³ Legislators devised the advertising ban as a means of minimizing the harmful effects of legalized gambling on the population while simultaneously allowing gambling to bolster the commonwealth's tourism industry.³³⁴ Yet, Puerto Rico took no steps to prevent suspected harms by forbidding resident gambling. To the contrary, "Puerto Rico has legalized gambling casinos, and permits its residents to patronize them."³³⁵ Justice Brennan, dissenting, concluded from these facts that "the Puerto Rico Legislature has determined that permitting residents to engage in casino gambling will not produce the 'serious harmful effects' that have led a majority of States to ban such activity."³³⁶ Nonetheless, five justices had "no difficulty in concluding" that Puerto Rico's interest in the advertising ban was substantial.³³⁷ Even if the commonwealth's interest was "substantial," a characterization which seems unreasonable under the circumstances, its justification for the advertising ban was certainly not "compelling."

Here, as in *Central Hudson*, "the conduct of citizens is molded by the information that government chooses to give them."³³⁸ The government of Puerto Rico sought "to manipulate private behavior by depriving citizens of truthful information concerning lawful activities."³³⁹ Such manipulation violates core speech values, like "viewpoint- and public-agenda-neutrality,"³⁴⁰ equality, liberty, autonomy and dignity.

Posadas is also troubling to the extent that it condones discriminatory treatment of intended listeners.³⁴¹ Recall that the Puerto Rico statute sustained by the Court prohibited advertising

333. *Posadas*, 478 U.S. at 341.

334. *Id.*

335. *Id.* at 353 (Brennan, J., dissenting).

336. *Id.*

337. *Id.* at 341.

338. *Central Hudson*, 447 U.S. at 575 (Blackmun, J., concurring in the judgment).

339. *Posadas*, 478 U.S. at 351 (Brennan, J., dissenting).

340. *Id.* (quoting Jonathan Weinberg, Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 750 (1982)).

341. *See id.* at 360 (Stevens, J., dissenting). As Justice Stevens reasoned:

The regulation . . . poses what might be viewed as a reverse privileges and immunities problem: Puerto Rico's residents are singled out for disfavored treatment in comparison to all other Americans. But nothing so fancy is required to recognize the obvious First Amendment problem in this kind of audience discrimination.

Id. (footnote omitted).

aimed at commonwealth residents, but it allowed wide dissemination of advertising to non-residents. "The First Amendment surely does not permit Puerto Rico's frank discrimination among publications, audiences, and words."³⁴² Discrimination is antithetical to the First Amendment. To the extent government unjustly 'deprives any potential listeners of truthful information which might influence the listeners' thinking on the subject of the advertisement, the restriction violates core First Amendment values like liberty, equality, autonomy, dignity and democracy. Moreover, deference to governmental suppression of truthful information for such tenuous an excuse as feared harm to citizens violates the objectives of the Amendment like advancement of knowledge, truth, democracy, self-government and private and public decisionmaking.

[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment.³⁴³

Blind deference to state suppression is a stance strikingly at odds with our free speech tradition. Yet, *Posadas* evinces the Court's willingness to tolerate threats to constitutionally protected speech by government authorities.³⁴⁴ The *Posadas* Court failed to hold the state to its burden of establishing both a substantial interest in regulating casino advertising and the absence of less restrictive means to accomplish the state's objective, assuming it was legitimate.³⁴⁵ To the extent courts fail their appointed constitutional function and yield to social pressure embodied by actions of the political branches, the judiciary places the First Amendment in grave jeopardy.³⁴⁶

342. *Id.* at 363 (Stevens, J., dissenting).

343. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 791-792 (1978) (footnotes omitted).

344. *See Posadas*, 478 U.S. at 358-59 (Brennan, J. dissenting) (accusing the majority of "giving government officials unprecedented authority to eviscerate constitutionally protected expression").

345. Indeed, the Court even deferred to the legislature to determine whether or not a less restrictive alternative would be adopted. *See id.* at 344 ("We think it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising.")

346. Deference by the courts to decisions of the political branches to restrict speech

For these reasons, *Posadas* poses a serious threat to the values of free speech and a substantial danger of doctrinal dilution, both within and beyond the category of commercial speech.³⁴⁷ The practical reasoning methodology advocated here provides an alternative analytical approach designed to repel that threat by assuring that First Amendment outcomes will not be so dependent on discretionary judgments. Judicial discretion would be cabined within the Rules; First Amendment decisions would be more principled, predictable and faithful to the Amendment's tradition. The web of First Amendment values combined with practical reason minimizes the danger of future *Posadases*.

4. The Need to Keep Faith with *Virginia Pharmacy — Board of Trustees v. Fox*

The Court's recent decision in *Board of Trustees v. Fox*³⁴⁸ further illustrates the need for courts to apply practical reasoning in the commercial speech context. In *Fox*, the Court considered whether or not a regulation excluding from university dormitories all speech activity motivated by profit should be struck as an unconstitutional restriction of free speech rights.³⁴⁹ At issue was the attempt of a company that sold housewares to hold what the Court called "Tupperware parties" in dormitories.³⁵⁰ At these "parties," the company offered housewares for sale and provided information on topics "such as how to be financially responsible and how to run an efficient home."³⁵¹

The Court properly recognized that the speech at issue had to be categorized first so that the appropriate level of protection could be ascertained.³⁵² It also observed that the university prohibition on private commercial activity in student dormitories implicated both pure speech and commercial elements.³⁵³ The students chal-

raise the spectre of those authorities determining the content of the First Amendment, a proposition with a dubious history. See *supra* sources cited at 261 and text accompanying notes 278-80.

347. For an example of the effects of such a doctrinal dilution, see the Court's subsequent decision in *Board of Trustees v. Fox*, 492 U.S. 469 (1989).

348. *Id.*

349. *Id.* at 473.

350. *Id.* at 472.

351. *Id.* at 474.

352. *Id.* at 473.

353. *Id.* at 474.

lenging the university's regulation argued unsuccessfully that the commercial and noncommercial aspects of the speech were "inextricably intertwined" and, therefore, that the speech as a whole should be categorized as noncommercial.³⁵⁴ However, rather than separating the pure, i.e., noncommercial, speech from the commercial and applying a higher standard of protection for the pure speech, the Court determined that the limited protections accorded commercial speech govern the whole of the speech at issue as if it were solely commercial.³⁵⁵ Thus, the *Fox* Court's decision to judge core speech by lesser speech standards graphically illustrates the insidious effect of doctrinal dilution.

In addition, *Fox* provides further evidence of the threat to the First Amendment posed by the Court's blind deference to social regulation. The *Fox* Court rejected the "least restrictive means" as the appropriate standard for assessing the fourth prong of the *Central Hudson* test.³⁵⁶ Instead, the Court found that its "decisions require . . . a [reasonable, narrowly tailored] 'fit' between the legislature's ends and the means chosen to accomplish those ends" to uphold the governmental restrictions of speech.³⁵⁷ "Within those bounds we [the Court] leave it to governmental decisionmakers to judge what manner of regulation may best be employed."³⁵⁸ The *Fox* Court remanded the case to the district court to determine whether or not the regulation was more restrictive than necessary based on the "reasonable fit" standard.³⁵⁹

354. *Id.* In rejecting that contention, the Court stated:

[T]here is nothing whatever "inextricable" about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching some economics, or to teach home economics without selling housewares. Nothing in the [regulation] prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

Including these home economics elements no more converted [the company's] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech.

Id. at 474-75.

355. *Id.* at 475.

356. See *supra* text accompanying notes 285-299.

357. *Fox*, 492 U.S. at 480 (quoting *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986)).

358. *Id.*

359. *Id.* at 486.

Justice Blackmun, in dissent, remains true to the *Virginia Pharmacy* paradigm and attacks the university regulation for its overbreadth.³⁶⁰ Justice Blackmun notes the university's concession that its regulation bars "any speech in a dormitory room for which the speaker receives a profit," and he observes that even tutors would fall within this prohibition.³⁶¹ He concludes for the dissent that "[b]y prohibiting *all* speech in a dorm room if the speaker receives a fee, the [regulation] . . . indiscriminately proscribes an entire array of wholly innocuous expressive activity, and for that reason is substantially overbroad."³⁶²

If practical reasoning were applied to the *Fox* scenario, no remand would be necessary. Having properly categorized the speech at issue as involving commercial elements, a court's attention could be focused toward those aspects as it evaluated asserted government restrictions. In *Fox*, the government regulator asserted a substantial interest: "promoting an educational rather than commercial atmosphere on [the university's] campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility."³⁶³ The university would also have a substantial interest in preventing coercion, harassment, deception or invasion of privacy that tend to occur in in-person solicitations. However, practical reasoning would demand that these interests be advanced directly by regulations government imposes and in a manner that treads lightly on free speech. Where truthful speech is at issue, restrictions that satisfy these criteria include only those the government can prove constitute the least restrictive means available.³⁶⁴

B. Rule 2: Speech With Elements of Deception, Coercion, Duress or Harassment.

Rule 2 is designed to sort out the tensions which may exist in some commercial speech in order to forge the proper accommodation of free speech values with competing interests in the commercial context. Given the preferred value of free speech in our society, the accommodation must generally favor speech. Nevertheless,

360. *Id.* at 487 (Blackmun, J., dissenting).

361. *Id.*

362. *Id.* at 489.

363. *Id.* at 475.

364. See *supra* text accompanying notes 283-84, 298-99.

government may place restrictions on speech when it demonstrates a substantial interest in doing so.

To restrict speech, the state must follow "carefully structured commercial speech standards . . . to ensure the full evaluation of competing considerations and to guard against impermissible [intrusions on speech] and discrimination among different categories of commercial speech."³⁶⁵ These standards mandate that any regulation must be carefully drawn to advance directly the asserted interest, and that the restriction be no greater than necessary to serve that interest. This section illustrates how these goals may be accomplished.

1. More Rather Than Less Disclosure — Mailed Announcements Soliciting Legal Business.

In re R.M.J. demonstrates how accommodations may be achieved in a manner appropriate to the protection of free speech values.³⁶⁶ *R.M.J.* concerned four asserted commercial speech problems arising from a mailed advertisement for legal services.³⁶⁷ *R.M.J.*, the lawyer, had mailed advertisements describing practice areas in which he had special expertise and listing the prices he charged for certain routine service.³⁶⁸ *R.M.J.* challenged state ethics rules barring dissemination of this information as vio-

365. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 661 (1985) (Brennan, J. concurring).

366. *In re R.M.J.*, 455 U.S. 191, 204 (1982).

367. *Id.*

Justice O'Connor, dissenting in *Zauderer v. Office of Disciplinary Counsel*, enumerated the traditional justifications for prohibiting attorney advertising. These views provide the context for the Court's careful scrutiny of state laws regulating such advertising. The state regulations at issue were enacted largely in response to the Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), invalidating absolute prohibitions of attorney advertising. According to Justice O'Connor:

At least two persuasive reasons can be advanced for the restrictions [on unsolicited legal advice]. First, there is an enhanced possibility for confusion and deception in marketing professional services. Unlike standardized products, professional services are by their nature complex and diverse. Faced with this complexity, a layperson may often lack the knowledge or experience to gauge the quality of the sample before signing up for a larger purchase. Second, and more significantly, the attorney's personal interest in obtaining business may color the advice offered in soliciting a client. As a result, a potential customer's decision to employ the attorney may be based on advice that is neither complete nor disinterested.

Zauderer, 471 U.S. at 674 (O'Connor, J., dissenting) (citation omitted).'

368. *Id.* at 196.

lating the First and Fourteenth Amendments.³⁶⁹ The Court considered four breaches of the disciplinary rules.

The Missouri disciplinary rules at issue in *R.M.J.* prescribed the manner in which attorneys could advertise their areas of practice, including the precise wording lawyers could employ.³⁷⁰ *R.M.J.* strayed from the permitted language in describing his practice areas. However, the Court noted that *R.M.J.*'s deviation from the rules "ha[d] not been shown to be misleading."³⁷¹ In fact, *R.M.J.*'s description of his practice areas was truthful, nondeceptive and "in certain respects . . . more informative than" the labels approved by the professional disciplinary rule.³⁷² Accordingly, the Court found no substantial interest served by the rule's restriction to balance against First Amendment values.

The Court viewed similarly the rule's prohibition of attorneys listing the jurisdictions in which they are licensed to practice.³⁷³ Indeed, the Court characterized that information as "factual and highly relevant."³⁷⁴ The Court did find disturbing the prominence *R.M.J.*'s advertisement gave his membership in the bar of the United States Supreme Court.³⁷⁵ It considered the fact "uninformative" and its emphasis in "bad taste." Nonetheless, the record failed to indicate the fact was misleading, and the Court declined to subject this "potentially misleading" statement to the disciplinary rules' restrictions.³⁷⁶ Searching for an indication that the disciplinary rule considered the fact of Supreme Court practice potentially misleading, the Court observed that the rule contained no prescription of type-size nor a requirement that the significance (or insignificance) of such status be explained.³⁷⁷ If a state were to find such a label misleading to consumers, the Court's observations might serve as appropriate remedies. Under the *Virginia Pharmacy* paradigm, more disclosure is preferable to less.

The last problematic aspect of the advertising in *R.M.J.* was its

369. *Id.* at 198.

370. *Id.* at 194-95.

371. *Id.* at 205.

372. *Id.* For example, the advertisement listed "real estate" in lieu of "property" as set forth in the disciplinary rule and "contracts" and "securities" though nothing similar appeared on the sanctioned list. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* at 206.

377. *Id.*

dissemination through the mail. Solicitation of legal business by mail presents potential problems of coercion, harassment and duress. However, the Court determined that "absolute prohibition" was not the proper solution.³⁷⁸ The Court concluded that a less intrusive restriction on speech, such as "requiring a filing" with an appropriate agency so "the state may be able to exercise reasonable supervision over such mailings," could adequately protect the state interest.³⁷⁹

The Court's analysis in *R.M.J.* illustrates the proper regard for truthful information in the face of legitimate state concerns which would tend to restrict dissemination. *R.M.J.* is thus consistent with the rationale of the *Virginia Pharmacy* paradigm that more information is better than less.

2. Disclosure as a Remedy for Potential Deception — *Peel v. Attorney Registration & Disciplinary Commission*³⁸⁰

The Court's decision in *Peel v. Attorney Registration & Disciplinary Commission* follows from *R.M.J.* In *Peel*, a lawyer advertised his certification by the National Board of Trial Advocacy (NBTA).³⁸¹ The fact was truthful, accurate and readily verifiable.³⁸² Nevertheless, the Court continued its inquiry to determine "whether the potentially misleading character of such statements creates a state interest sufficiently substantial to justify a categorical ban on their use."³⁸³ The state had argued consumers might be misled by the labels "certified" or "specialist."³⁸⁴ After all,

378. *Id.*

379. *Id.*

380. 110 S. Ct. 2281 (1990) (plurality opinion).

381. *Id.* at 2284. *Peel*'s letterhead identified him as a "Certified Civil Trial Specialist." *Id.* at 2285.

382. *Id.* at 2288.

383. *Id.* at 2287.

384. *Id.* at 2290; *see also id.* at 2294 (Marshall, J., concurring). Justice Marshall explained that:

[t]he name "National Board of Trial Advocacy" could create the misimpression that the NBTA is an agency of the Federal Government. Although most lawyers undoubtedly know that the Federal Government does not regulate lawyers, most nonlawyers probably do not Furthermore, the juxtaposition on petitioner's letterhead of the phrase "Certified Civil Trial Specialist By the National Board of Trial Advocacy" with "Licensed: Illinois, Missouri, Arizona" could lead even lawyers to believe that the NBTA, though not a governmental agency, is somehow sanctioned by the states listed on the letterhead.

Id. (Marshall, J., concurring). Justice Marshall also suggested that "the reference to

potential clients often have limited bases for evaluating the quality of legal services offered. The plurality found the argument insufficient to justify suppression of such truthful information.³⁸⁵

In *Peel*, as in *R.M.J.*, the appropriate remedy for alleviating the state's concerns is more information not less. The Court suggested a number of alternatives reflecting this approach.³⁸⁶ Once again, the plurality took the opportunity to endorse "the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information."³⁸⁷

3. Disclosure as a Remedy for Potential Undue Influence

a. *Zauderer v. Office of Disciplinary Counsel*³⁸⁸ — Newspaper Advertising

Zauderer v. Office of Disciplinary Counsel illustrates the increasing sophistication of commercial speech. Zauderer, an attorney, published a newspaper advertisement targeted at persons he knew would be in need of legal services, specifically, women who had suffered injuries resulting from their use of the Dalkon Shield intrauterine contraceptive device.³⁸⁹ Zauderer's advertisement presented the Court with three regulations to test against the First Amendment shield for nondeceptive commercial speech: "prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems; restrictions on the use of illustrations in advertising by lawyers; and disclosure requirements relating to the terms of contingent fees."³⁹⁰

Assessing the first violation, the Court found (as the Office of Disciplinary Counsel had conceded) that Zauderer's advertisement represented "entirely accurate" facts about the IUD and did not mislead readers to believe that Zauderer promised success in litigating potential claims.³⁹¹ "[T]he advertisement reported the indis-

[Peel's] certification as a civil trial specialist may cause people to think that [Peel] is necessarily a better trial lawyer than attorneys without the certification." *Id.* at 2295.

385. *Id.* at 2292.

386. *See id.* at 2292-93.

387. *Id.* at 2292 (citing *Virginia Pharmacy and Fox*).

388. 471 U.S. 626 (1984).

389. *Id.* at 630-31.

390. *Id.* at 638.

391. *Id.* at 639-40.

putable fact that the Dalkon Shield had spawned an impressive number of lawsuits and advised readers that appellant was willing to represent other women asserting similar claims."³⁹² It also "advised women that they should not assume that their claims were time-barred" ³⁹³

The Court rebuked the state's argument that difficulty consumers may encounter in distinguishing truthful and helpful legal advice offered in an advertisement from false information warranted an absolute ban on such advice.³⁹⁴ The Court found attorney advertising no more problematic than advertising for other goods and services. "[I]ndeed, insofar as [Zauderer's] advertising tended to acquaint persons with their legal rights who might otherwise be shut off from effective access to the legal system, it was undoubtedly more valuable than many other forms of advertising."³⁹⁵ Zauderer's advertisement implicates many of the values that form the web supporting free speech: he advances readers' knowledge about the state of Dalkon Shield litigation and potential opportunities for recovery, he advances his own interests by attracting clients and advances listeners' interests by encouraging them to seek counsel, and finally, he conveys information which can facilitate private and public decisionmaking. Thus, on its face, Zauderer's speech merits protection from state suppression.³⁹⁶

At first glance, Zauderer's advertisement appears to come within the parameters of the Rule 1 formula; because the speech conveys truthful, verifiable and nondeceptive information, the state should be required to prove that a *compelling* interest justifies the restriction. However, Rule 2 provides the better test for this case given the Court's earlier acknowledgement that some forms of attorney solicitation might warrant state restriction. Specifically, in *Ohralik v. Ohio State Bar Association*, the Court held that states had a compelling interest in restricting in-person solicitations of clients "that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious' conduct."³⁹⁷ The state analogized Zauderer's targeted advertisement to in-person solici-

392. *Id.* at 640.

393. *Id.*

394. *Id.* at 644-45.

395. *Id.* at 646.

396. *See supra* text accompanying notes 281-84.

397. 436 U.S. 447, 468 (1978).

tion, finding comparable problems associated with both.³⁹⁸ Such assertions by the state merit careful review and place *Zauderer* in Rule 2 where close attention may be focused on the tensions inherent in this commercial speech.

Analyzing the state's reliance on *Ohralik*, the Court found speculation of coercion and undue influence unconvincing. The medium employed by *Zauderer* to convey his message was dispositive.³⁹⁹ Print advertising of the type at issue in *Zauderer* poses significantly less danger of overreaching, undue influence or coercion than may be present in other forms of solicitation, particularly in-person contacts with potential clients.⁴⁰⁰ The content of print matter may be verified relatively easily and reliably. Print advertising, moreover, can convey ideas and information in a manner that is conducive to listeners' reflection and exercise of free choice. It is thus a relatively neutral or "value-free" presentation of the message. For these reasons, print advertising is particularly useful in directing information toward the truth and away from the false expression. To the extent the Court considered such details as the differences in advertising media and weighed the state's concern in light of those facts, *Zauderer* illustrates the methodology of Rule 2 in which close attention is to be given the competing free speech and communitarian values.

Zauderer also focused the Court's attention on protection of art in advertising, a prime candidate for applying the Rule 2 formula.⁴⁰¹ Illustrations can implicate important free speech values because they draw listeners' attention to the message, impart information directly and possess artistic value.⁴⁰² Therefore, an accurate, nondeceptive, noncoercive commercial illustration of the type in *Zauderer* is entitled to the same First Amendment protection as written or verbal communication.⁴⁰³ However, assessing a state's interest in restricting particular artwork in advertising may be more difficult than construing the text of commercial speech to the extent illustrations "operat[e] on a subconscious level."⁴⁰⁴ Accord-

398. *Zauderer*, 471 U.S. at 641.

399. *Id.* at 642.

400. *Id.*

401. *Id.* at 647-49.

402. *Id.* at 647. For a discussion of the free speech value of art, see *supra* text accompanying note 156.

403. *Zauderer*, 471 U.S. at 647.

404. *Id.* at 648.

ingly, where artwork is the target of commercial speech regulators, challenges are best handled on a case-by-case basis where close attention may be focused on the competing factors at issue.

The third regulation in *Zauderer* illustrates the process by which Courts may sanction restrictions on truthful but misleading commercial speech. *Zauderer* failed to disclose in his advertisement that notwithstanding his contingent-fee arrangement, clients might be liable for certain costs whether or not successful in their claims.⁴⁰⁵ The state regulations required affirmative disclosure of these facts to prevent laypersons from being misled by the subtle distinction between fees and costs.⁴⁰⁶ Because of the potential for deception in using those terms without explanation, the state demonstrated a substantial interest in regulation.

The state's response provides a vehicle for examining the latter steps of the Rule 2 analysis. That is, given a substantial interest, the state must respond with regulations that advance its interests without sweeping too broadly. Outright suppression clearly would not meet this test. Because the preferred remedy is more rather than less information, disclosure requirements like those mandated by the state in *Zauderer* are preferable. Disclosure requirements directly advance the interest in preventing deception or confusion in the marketplace, but may be applied in a way that treads minimally on free speech values.⁴⁰⁷ As the Court concluded, the state's requirement that attorneys like *Zauderer* disclose that litigants will have to pay costs even if unsuccessful in their suits "easily passes muster."⁴⁰⁸

b. *Shapero v. Kentucky Bar Association*⁴⁰⁹ — Direct Mail Advertising

Shapero v. Kentucky Bar Association sanctioned direct mail advertising by attorneys to potential clients known to be facing particular legal problems. As in *Zauderer*, the rule of professional responsibility governing *Shapero* categorically banned the conduct

405. *Id.* at 650.

406. *Id.* at 652.

407. *Id.* at 651. While "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech, . . . an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*

408. *Id.* at 652.

409. 486 U.S. 466 (1988).

at issue.⁴¹⁰ Blanket bans on expression offend the First Amendment, as *Virginia Pharmacy* and its progeny make clear. A broad restriction cannot survive when a more narrowly tailored regulation of the perceived evil is feasible.⁴¹¹

Like the *Zauderer* facts, the perceived evils in *Shapero* included the potential for overreaching and undue influence.⁴¹² The state equated targeted direct mailings with in-person solicitation, characterizing Shapero's letters as "'Ohralik in writing.'" ⁴¹³ However, as in *Zauderer*, the medium was dispositive. The Court admitted, "[i]n assessing the potential for overreaching and undue influence, the mode of communication makes all the difference."⁴¹⁴ The Court concluded that written communication, even though personalized, is not accompanied by the threat of abuse which attends in-person contact of lawyers seeking business with potential clients in need of particular legal advice.⁴¹⁵ Moreover, the Court repeated its finding in *Zauderer* that written advertisements can be beneficial to recipients.⁴¹⁶ Written solicitation, in short, disseminates information and ideas in a manner conducive to furthering rational private and public decisionmaking.

Nonetheless, targeted mailings are not immune to state regulation. States have an interest in policing such advertising to prevent the abuse which could arise. For example, a personalized letter may present an increased risk of deception.⁴¹⁷ The practical reasoning approach embodied in Rule 2 would mandate that the state's response to this concern be tailored to allow the practice, subject to restrictions designed to assure the veracity of the speech. The Court offered some suggestions for regulating abuses.⁴¹⁸

410. *Id.* at 471 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1984)).

411. *Id.* at 472 (citing *In Re R.M.J.*, 455 U.S. 191, 203 (1982)).

412. *Id.* at 475.

413. *Id.* For a discussion of *Ohralik*, see *infra* text accompanying notes 421-33.

414. *Shapero*, 486 U.S. at 475.

415. *Id.* at 475-76.

416. *Id.* at 476.

417. *Id.* The Court suggested that a personalized letter

could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly suggest that the recipient's legal problem is more dire than it really is Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advice.

Id.

418. *See id.* at 476-77.

With respect to facts in personalized letters about the recipient, the Court proposed that a state:

might, for example, require the lawyer to prove the truth of the fact stated (by supplying copies of the court documents or material that lead the lawyer to the fact); it could require the lawyer to explain briefly how she discovered the fact and verified its accuracy; or it could require the letter to bear a label identifying it as an advertisement or directing the recipient how to report inaccurate or misleading letters.⁴¹⁹

As the *Shapero* Court reminded, the theory of free speech protection for commercial speech is "grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."⁴²⁰

4. *Ohralik v. Ohio State Bar Association* — In-person Solicitation of Legal Business⁴²¹

Ohralik illustrates application of practical reasoning yielding an outcome less deferential to free speech rights. In *Ohralik*, the balance tipped toward the state's interest notwithstanding the thumb which rests constantly on the First Amendment side of the scale. In *Ohralik*, the Court upheld an absolute prohibition of in-person solicitation of clients by attorneys.⁴²² Even *Ohralik* admitted that "the State has a legitimate and indeed 'compelling' interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'"⁴²³

Free speech theory explains why the *Ohralik* holding differs

419. *Id.* at 477-78 (citations omitted).

420. *Id.* at 478 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985)).

421. 436 U.S. 447 (1978).

422. *Id.* at 468. After learning of a car accident, *Ohralik* visited one of the drivers in the hospital to solicit her business. He then found a passenger, also injured but by that time released from the hospital, at her home and purportedly obtained her business as well. *Id.* at 450-52. When the accident victims attempted to discharge him, *Ohralik* sued them for breach of contract and obtained portions of their insurance settlements. *Id.* at 452.

423. *Id.*

from *Zauderer* and *Shapero* in which the Court refused to condone absolute bans of the speech undertaken. First, in-person solicitation is materially different than written speech.⁴²⁴ Second, the state's interest is more significant in the *Ohralik* scenario than in less direct forms of communication.⁴²⁵ Like other forms of commercial speech, in-person solicitation can be an effective means of imparting information to listeners.⁴²⁶ As we accumulate information, we evaluate its veracity and significance and formulate our decisions accordingly. This process embodies the objective of free speech. However, in-person solicitation detracts from free speech values to the extent it truncates the information-gathering process the listener would otherwise undertake. In-person solicitation, thus, has the potential of constricting the flow of information to the recipient, thereby inhibiting the listener's ability to judge the speech which is conveyed. As a result, listeners can be misled and effectively deprived of the thing free speech is meant to ensure — the right to make an informed, autonomous decision.⁴²⁷

Beyond the theoretical explanation of in-person solicitation as an impediment to advancing truth or facilitating decisionmaking, the *Ohralik* Court found the potential for harm particularly compelling under the circumstances. Because *Ohralik* was a trained advocate expounding upon specialized information, i.e., the law, his prospective clients were particularly susceptible to *Ohralik*'s control.⁴²⁸ These circumstances tipped the balance even further in favor of the state's position.

Having confirmed the state's interest, the Rule 2 analysis would at this point require that the scope of the state's regulation also be examined. Indeed, in *Ohralik*, the attorney challenged not the state's interest, but its application of the ban in his case.⁴²⁹ However, the Court found the state's "prophylactic" restriction on in-person solicitation of clients justified. In addition to the inherently harmful nature of in-person solicitation, sound, practical reasons support the ban. Chief among these is the fact that in-person solici-

424. See *supra* text accompanying notes 397-98.

425. See *Ohralik*, 436 U.S. at 455 (comparing the state's interest in the case at bar with the state's interest in *Bates v. State Bar of Ariz.* where the Court struck absolute bans of attorney advertising).

426. See, e.g., *id.* at 458 ("tip" about existence of uninsured motorist coverage).

427. See *id.* at 457-58 (discussing the potentially oppressive nature of in-person solicitations).

428. *Id.* at 464-66.

429. *Id.* at 462.

tation "is not visible or otherwise open to public scrutiny, . . . rendering it difficult or impossible to obtain reliable proof of what actually took place."⁴³⁰ As a result, any in-person solicitation permitted "would be virtually immune to effective oversight and regulation by the State or by the legal profession"⁴³¹ Given this outcome, the ban, albeit "prophylactic," would constitute an appropriately tailored, effective response by the state.

Notwithstanding the conclusion in *Ohralik*, the preferred position of free speech in our value structure demands that such a ban apply only in those situations where one-sided, badgering, imminently coercive and harmful conduct is likely to occur or has actually occurred in the past. Practical reason requires careful, judicious assessment of particular situations so that accommodation of free speech values for competing social interests are properly structured to allow as much speech as possible. Certainly, in-person communications with respect to political expression, associational petition rights and other fundamental rights are permissible.⁴³² There may even be room for truthful, noncoercive, nondeceptive in-person proposals of legal representation or other commercial transactions if those qualities could be ensured.⁴³³

4. Electronic media.

The electronic media presents unique and difficult problems in the commercial speech context, and a comprehensive treatment of this subject is beyond the scope of this article. Nevertheless, treatment of persuasive electronic media expression follows from free speech theory, and its general handling is sketched here.

First, the quality of speech disseminated electronically is mate-

430. *Id.* at 466.

431. *Id.* (footnote omitted).

432. See, e.g., *In re Primus*, 436 U.S. 412, 439 (1978) (holding that solicitation of clients on behalf of ACLU constitutes political expression not subject to advertising restrictions as rigid as those imposed by state disciplinary rules). One way of distinguishing *Ohralik* from *Primus* is the presence of "pecuniary gain" as a "significant motive" for the solicitation.

433. See *Ohralik*, 436 U.S. at 472 n.3 (Marshall, J., concurring) (discussing "'benign' solicitations of clients"). For example, lawyers might be permitted to propose representation of a prospective client following required disclosure of their purpose and interests, including financial or other conflicts. Another alternative, less restrictive than a ban, would be institution of a cooling-off period of suitable length after a solicitation so as to allow a prospective client time to consider and reevaluate the proposal and, upon reflection, rescind any commitment agreed upon with impunity.

rially different than written information. Certainly, electronic media advertising can inform the public of valuable ideas and information, thus implicating important First Amendment values. However, much of the advertising circulated by these media actually contain little informational value. Moreover, that information which is present could easily be disseminated through alternative media that implicate less weighty state interests.

Electronic media rely pervasively on nonverbal techniques to convey messages through emotional and subliminal appeals. These techniques are designed more to persuade than inform using one-sided, manipulative presentations.⁴³⁴ Indeed, the classical conditioning paradigm is especially suited to electronic media advertising because "consumers generally receive [it] passively since they control neither the opportunity to receive the information nor the pace and duration of exposure."⁴³⁵ Unlike print material, consumers tend not to consider actively information conveyed by electronic media, or to be able to reconsider or evaluate such information at their discretion. Of course, the audience chooses whether or not to encounter the media, but once they do, "they [tend] to process information without critical deliberation."⁴³⁶ Electronic media advertising is, thus, not conducive to reflection or free choice, prerequisites to informed, rational and reliable decisionmaking.

434. See *supra* text accompanying notes 228-30. Commentators have long recognized these problems. See, e.g., MEIKLEJOHN, *supra* note 8, at 87 ("The radio as it now operates among us is not free. Nor is it entitled to the protection of the First Amendment. It is not engaged in the task of enlarging and enriching human communications. It is engaged in making money."); SHIFFRIN, *supra* note 13, at 92 ("American television is a powerful educator, and the kind of person encouraged by American television is substantially at odds with the kind of person encouraged in American schools."). Courts also have acknowledged these problems. See, e.g., FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978) ("the broadcast media have established a uniquely pervasive presence in the lives of all Americans"); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 127 (1973) ("viewers constitute a 'captive audience'"); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 584-86 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972) (upholding prohibition of cigarette advertising on electronic media). According to the *Mitchell* court, "[t]he unique characteristics of electronic communication make it especially subject to regulation in the public interest." *Id.* at 582. "Substantial evidence showed that the most persuasive advertising [for cigarettes] was being conducted on radio and television, and that these broadcasts were particularly effective in reaching a very large audience of young people . . . [and had] potential influence on young people." *Id.* at 585-86. "[T]here are significant differences between the electronic media and print . . . 'It is difficult to calculate the subliminal impact of this pervasive propaganda . . .'" *Id.* at 586.

435. Reed & Whitman, *supra* note 225, at 280.

436. *Id.* at 280 n.61.

On the other hand, music, graphics and dramatizations possess artistic value which, in its own right, constitutes a form of protected core speech. However, the artistic value of commercial speech generally furthers the goal of inducing purchases without providing consumers information relevant to their spending decisions. Accordingly, commercial speech should have less weight in the First Amendment equation notwithstanding its artistic merit. The Rule 2 formula provides the appropriate framework for evaluating electronic media advertising because the images it conveys may be misleading even if accurate. Use of nonverbal techniques in the commercial context should be judged on the basis of whether they are "predominately informational" from a First Amendment standpoint.⁴³⁷ Under that rule, there may be important First Amendment value associated with graphical techniques, while less free speech value is identified with musical or dramatic techniques.

In sum, the quality of electronic media speech is low from the standpoint of free speech theory. Indeed, to the extent this form of commercial speech persuades rather than informs, it "may disserve the individual and societal interest . . . in facilitating informed and reliable decisionmaking" as in the case of in-person solicitation.⁴³⁸

Second, weighing against the weak speech value of electronic advertising are relatively strong state interests. Commercial speech delivered via the electronic media can be deceptive, misleading, coercive, unduly influential, overreaching and abusive.⁴³⁹

On balance, therefore, any accommodation of electronic advertising with governmental interests should generally be struck in favor of regulation. Of course, regulation is tolerable only in the face of concrete harm, proof of which authorities must establish. Moreover, electronic media cases certainly should be evaluated carefully on a case-by-case basis in order to scrutinize the presence

437. *In re Felmeister & Isaacs*, 518 A.2d 188, 189 (N.J. 1986) (attorney advertising need be predominately informational, "both in quality and quantity, the communication of factual information rationally related to a consumer's need for, and choice of, counsel predominates") *Accord In re Zang*, 741 P.2d 267 (Ariz. 1987), *cert. denied*, 484 U.S. 1067 (1988).

438. *Ohralik*, 436 U.S. at 458.

439. See *supra* text accompanying note 223. These interests are informed by the central justifications for the secondary status of commercial speech as described in Part III(D), *supra* notes 211-52 and accompanying text, especially the speech plus conduct rationale set forth *supra* text accompanying notes 218-23. The Court's definition of commercial speech also reflects these justifications. See *supra* text accompanying note 221.

of free speech value and, where appropriate, protect such value.⁴⁴⁰ In the absence of significant First Amendment value, however, officials should have a relatively free hand to regulate. Applying these standard First Amendment principles to electronic media speech does not, however, justify an absolute ban on non-verbal techniques. Less restrictive means must be employed in the concrete case that directly advances the state interest while appropriately protecting speech.

C. Rule 3: False Information

False information possesses relatively little First Amendment value.⁴⁴¹ Accordingly, it may generally be regulated. For example, advertisements of services costing \$100 when in actuality they cost \$150 should be subject to regulation. Likewise, a false statement that a company has voluntarily petitioned for bankruptcy may be regulated. Nevertheless, to protect important speech values, it may be necessary to provide expression some "breathing room" in specific cases. For example, when punitive damages for libel are at issue, a stricter standard, i.e., actual malice, is appropriate.⁴⁴² While it may not always be easy to separate truthful speech from false speech, certainly much information is patently false and, accordingly, subject to regulation pursuant to Rule 3.

VII. CONCLUSION

By now the central meaning of the First Amendment is well settled. The task presently before us is to capture the more complete meaning of the Amendment. Inevitably, this means broadening the reach of the Amendment in order to enlarge our vision and construct an ever better understanding of life. Life is diverse and contrary, full of innate tensions, contradictions and complexities. This contrariness filters through the First Amendment prism amidst the broader expanse of reality reaching the Amendment's haven. But this tension poses great challenges to the substance and stability of the Amendment and to our reasoning

440. For example, the product advertised may influence the degree of regulatory control to be tolerated. Buying a household appliance is not like hiring a lawyer. A consumer can more easily judge the former and is less likely to be harmed by a misinformed decision with respect to that purchase. See *Felmeister & Isaacs*, 518 A.2d at 199.

441. See *supra* notes 303-06 and accompanying text.

442. *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 781 (1985) (Brennan, J., dissenting).

capabilities.

Coherence may best be secured through reliance on a web of beliefs collectively comprising our understanding as to how we should live. Stabilized by this web of values, we can focus careful attention on sorting out and resolving the inevitable tensions between the value of free speech and competing social interests. To accomplish this, we need draw upon the best of what human reasoning offers. Practical reasoning seems to provide the best route, harmonizing the rift between theory and practice while illuminating faithfully the essence of the Amendment. Truth might thus be discovered through confrontation with experience.⁴⁴³

In short, thinking small, concentrating on the concrete problem and building from the ground up has its advantages. Certainly compromises will have to be made along the way. Commercial speech is one of them. Nevertheless, the noble commitment to free speech is worth preserving in spite of the difficult compromises that remain ahead.

443. SHIFFRIN, *supra* note 13, at 146 (citing Ralph Waldo Emerson and other romantics).